90-1328

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GRAFF TRUCKING COMPANY, INC.,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission;
STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission;
and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the "bad faith" exception to the *Younger* doctrine established, where a state has utilized a variety of procedural tactics in both the state and federal courts, to prevent a ruling on the constitutionality of a state statute under the U.S. Constitution Commerce Clause and Supremacy Clause?

2. Is the "bad faith" exception to the *Younger* doctrine established, when a state continues to enforce a state statute against Petitioner and prosecute an action against Petitioner before a state administrative agency, after a state court in a criminal proceeding has found the state statute in question to be unconstitutional, under the U.S. Constitution, and dismissed charges against Petitioner?

3. Is *Younger* abstention inappropriate, where no vital state interest has been established or is involved?

PARTIES

PETITIONER

1) Graff Trucking Company, Inc.*

RESPONDENTS

1) Frank J. Kelley, Attorney General of the State of Michigan
2) William E. Long, Chairperson of the Michigan Public Service Commission
3) Steven M. Fetter, Commissioner of the Michigan Public Service Commission
4) Ronald E. Russell, Commissioner of the Michigan Public Service Commission
5) Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police

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* Graff Trucking Company, Inc., a Michigan corporation, has no parent or subsidiary corporations.

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IN THE

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OCTOBER TERM, 1990

NO. _____

GRAFF TRUCKING COMPANY, INC.,

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vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
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STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
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and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner Graff Trucking Company, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) denying the appeal of Petitioner is unreported. The opinion of the District Court below (Appendix B, *infra*, p. 3a) dismissing Petitioner's action is unreported. The opinion of the District Court below (Appendix C, *infra*, p. 9a) denying Petitioner's request for rehearing is unreported. The Court of Appeals below issued three subsequent orders, first denying Petitioner's request for rehearing (Appendix D, *infra*, p. 12a), then vacating that order (Appendix E, *infra*, p. 13a), and ultimately denying Petitioner's request for rehearing (Appendix F, *infra*, p. 14a), all of which are unreported.

JURISDICTION

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) was filed on August 31, 1990. Rehearing was sought and denied by ultimate order of the Court of Appeals filed on November 19, 1990 (Appendix E, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions involved are two. The first is the Commerce Clause, U.S. Const., Art. I, Sec. 8, Cl. 3, which states:

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

The other constitutional provision involved is the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioner Graff Trucking Company, Inc. (Graff) is a for-hire motor carrier, based in Kalamazoo, Michigan. It operates as a common and contract carrier, pursuant to authority granted to it by the Interstate Commerce Commission in Docket No. MC-205269 to transport general commodities between all points in the contiguous 48 states. Ninety percent of Graff's revenues are derived from operations in interstate commerce. The remaining ten percent of Graff's revenues are derived from operations in Michigan intrastate commerce, pursuant to authority held by Graff from the Michigan Public Service Commission (MPSC).

In order to conduct its trucking operation, Graff obtains a portion of its power equipment from owner-operators. These owner-operators lease the power unit, or tractor, to Graff for use by Graff in pulling trailers owned by Graff or leased by it from other sources. This equipment is then used to transport freight for customers of Graff.

Graff maintains an unincorporated operating division, known as the "Indiana" Division. Graff's Indiana Division is based at White Pigeon, Michigan, in southern Michigan close to the Indiana border.

Graff treats the owner-operators of its Indiana Division as independent contractors. Graff has always treated those owner-operators as independent contractors, in terms of its dealings with those individuals. Those owner-operators conduct trucking operations chiefly in interstate commerce, with, once again, about 90% of the drivers' operations involving interstate commerce, as is the case of Graff's operations overall. The other 10% of the time, the drivers of the Indiana Division conduct operations in Michigan intrastate commerce. The Interstate Commerce Commission allows motor carriers to treat their owner-operators as independent contractors, and has allowed such treatment historically.

In 1986, Graff began receiving from Staff of the MPSC letters informing Graff that its leases for motor carrier equipment on file with the Michigan Public Service Commission were in violation of a state statutory provision, MCL 479.10a(6), which provision requires that drivers of leased equipment, i.e., the owner-operators, be treated by the motor carrier as employees. Commencing in the summer of 1988, Officer Rodney B. Krietemeyer of the Motor Carrier Division of the Michigan State Police visited Graff's offices, and directed Graff to bring its operations into compliance with MCL 479.10a(6). These visits began at the same time that the MPSC published in its *Bi-Weekly Information Bulletin* a notice of a moratorium on enforcement of MCL 479.10a(6), while a study of enforcement of that provision was under review. The MPSC then notified carriers, through another notice in its *Information Bulletin*, that enforcement would commence on October 20, 1988, and there would be no exemptions, based on the incidental nature of intrastate operations conducted in relation to interstate operations. The state police officer's visits continued into the spring of 1989. The officer continued to instruct Graff to bring its operations into compliance, and threatened enforcement action.

On May 2, 1989, a complaint was filed by Graff in the U.S. District Court for the Western District of Michigan, seeking a judgment that the Michigan state statutory provision be declared null and void, as violative of the Commerce Clause and Supremacy Clause of the U.S. Constitution. On May 4, 1989, Officer Krietemeyer issued 14 misdemeanor citations against Graff, alleging violations of the state statutory provision requiring Graff to treat its drivers of leased equipment as employees. On May 22, 1989, Staff of the Michigan Public Service Commission filed a formal complaint with the MPSC against Graff, seeking a cease and desist order against Graff, monetary fines, and the revocation of Graff's intrastate operating authority, as well as other relief, because of the violations by Graff of MCL 479.10a(6). One of the admitted purposes of the filing of the formal administrative proceeding against Graff, according to Mr. Thomas Lonergan, the Direc-

tor of the Motor Carrier Regulation Division, was to avoid federal court jurisdiction.

Respondents answered the federal court complaint, based on the abstention doctrine as set forth in *Younger* v. *Harris*, 401 U.S. 37; 91 S.Ct. 746; 27 L.Ed.2d 669 (1971), as well as other grounds[1]. The U.S. District Court dismissed the action filed by Graff in federal court, based on *Younger*, *supra*, as there were two pending state proceedings against Graff[2].

While Graff was pursuing its appeal from the dismissal to the U.S. Court of Appeals, Graff presented and argued a Motion to Dismiss the state criminal charges against it, in the 3-2 Michigan Judicial District Court in Centreville, Michigan. By bench opinion issued on June 20, 1990, (see Appendix G, *infra*, p. 15a), and order entered on June 27, 1990, (see Appendix H, *infra*, p. 18a), the state district court dismissed the criminal charges, finding that the Michigan statute was repugnant to the Commerce Clause of the U.S. Constitution. The state did not appeal that judgment to the state circuit court, as the state had a right to do.

The MPSC continued to pursue enforcement against Graff in its administrative proceeding before the MPSC. Hearings in that cause were completed in April, 1990, the case was briefed, and the matter is awaiting the issuance of a proposal for decision by the Administrative Law Judge[3]. Respondents

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[1] Respondents also argued for dismissal based on such cases as *Burford* v. *Sun Oil Co.*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed.2d 1424 (1943), reh. den. 320 U.S. 214; 63 S.Ct. 1442; 87 L.Ed.2d 1851, and *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed.2d 971 (1941).

[2] These two proceedings were the state criminal proceeding, *People* v. *Graff Trucking, Indiana Division*, District Court No. 89-1137-1-ST (3-2 Judicial District), and the MPSC administrative proceeding *In the Matter of the Complaint Against Graff Trucking Company, Inc. Filed by the Michigan Public Service Commission Staff*, MPSC File No. T-1075.

[3] Under the Michigan Administrative Procedures Act, MCL 24.201, *et seq.*, the proposal for decision of a hearing officer can be appealed by any aggrieved party to the Commissioners themselves, pursuant to MCL 24.281.

continue to enforce actively MCL 479.10a(6) against Graff, as well as other carriers.

There has been a succession of attempts by carriers to obtain rulings from the state courts that this provision is unconstitutional since the beginning of 1988. (See Appendix I, *infra*, p. 20a, which charts these cases). Respondents, represented by the Attorney General, have succeeded in avoiding a decision on the merits in any of these court challenges, with the exception of state criminal proceedings. However, in *Graff* as well as in the two other criminal proceedings, prosecutions have been dismissed without appeal by the State of Michigan.

In *People of the State of Michigan* v. *CTX Division of Central Transport, Inc.*, District Court No. C-88-0736—C-88-0762, 34th Judicial District (April 26, 1989), (Appendix J, *infra*, p. 23a), for example, all 25 citations pending against the defendant carrier were dismissed, when the only matter before the court was a motion by defendant raising the same constitutional grounds which have been raised by Graff in this proceeding. That dismissal was not appealed by the State. In *People of the State of Michigan* v. *ABC Cartage Company*, District Court No. 89-002118, 52-3 Judicial District (May 15, 1990), (Appendix K, *infra*, p. 26a), an action was dismissed against a carrier for violation of MCL 479.10a(6), on an independent ground — that the statute did not require employment, in the manner interpreted by the MPSC. That decision was not appealed by the State either.

Other civil actions brought by carriers in the state courts however, have fallen to Respondents' procedural attacks. For example, the district court judge in the *CTX* proceeding, *supra*, first suggested that the defendant carrier file an action in state circuit court seeking a declaratory judgment while the criminal matters were held in abeyance. Defendant and the prosecutor stipulated to this process, and the judge signed an order to that effect (Appendix L, *infra*, p. 28a). An action was then commenced in Wayne County Circuit Court, entitled *Central Transport, Inc. and its CTX Division* v. *State*

of Michigan and the Michigan Public Service Commission, Wayne County Circuit Court No. 88-816850-CZ. By opinion dated March 22, 1989 (See Appendix M, *infra*, p. 31a), however, defendants' Motion to Dismiss was granted, based on the ground that the matter was already pending before a court of competent jurisdiction. This was in spite of the order of the district court judge and the stipulation of the prosecutor which had approved the filing of such an action. It was only after this circuit court opinion and a request by Defendant that its Motion to Dismiss was ripe for decision (see Appendix N, *infra*, p. 35a) that the state district court dismissed the citations, without appeal by the State.

On September 22, 1989, still another action was commenced in the circuit court, in *Universal Am-Can, Ltd.* v. *Frank J. Kelley, et al.*, Macomb County Circuit Court No. 89-3884-AW, seeking a declaratory ruling that the statute in question was unconstitutional. These same Respondents again filed a motion to dismiss, arguing, among other grounds, that plaintiff had failed to exhaust its administrative remedies, despite already existing MPSC decisions that it did not have the power to rule its own enabling statute unconstitutional, as *In the Matter of the Application of Central Transport, Inc.*, File No. C-6714, Case No. 60 (January 9, 1990) (see excerpt at Appendix O, *infra*, p. 38a). The circuit court judge, on January 19, 1990, dismissed the action in *Universal*, based on its failure to exhaust its administrative remedies (see Appendix P, *infra*, p. 40a). Universal's motion for rehearing was denied (see Appendix Q, *infra*, p. 43a), and that matter is presently pending on appeal, before the Michigan Court of Appeals[4]. The issue on appeal in that case involves the propriety of dismissal of the action, on exhaustion grounds, and not the merits of the constitutional challenge to MCL 479.10a(6).

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[4] That appeal has been docketed as Court of Appeals Docket No. 127145.

B. History of Proceedings and Basis for Federal Jurisdiction

As this case involves the issue of whether Respondents' action in defeating federal court jurisdiction in this case comes within the "bad faith" exception of *Younger*, various facts concerning the prior proceeding have been set out in the preceding discussion. A brief synopsis will be repeated here.

Graff filed its complaint with the U.S. District Court for the Western District of Michigan on May 2, 1989, when no state court proceedings were pending against it. Two days later, criminal citations were issued against Graff in state district court. Twenty days later, a formal complaint was commenced against Graff by Staff of the MPSC, in File No. T-1075. Respondents moved to dismiss the U.S. District Court action, based on *Younger* and two pending state proceedings in both state district court and before the administrative agency. The U.S. District Court granted the Motion to Dismiss on *Younger* grounds on August 18, 1989, and denied Graff's Motion for Rehearing on October 16, 1989. Graff appealed to the U.S. Court of Appeals for the Sixth Circuit.

The criminal charges against Graff were dismissed by the state district court, by bench opinion rendered June 20, 1990 and order issued June 27, 1990. That decision was not appealed by the People.

On August 31, 1990, the panel of the Sixth Circuit issued its decision affirming the U.S. District Court decision. Graff filed a petition for rehearing. Respondents were directed by the Court of Appeals to file a response. On November 6, 1990, the Court of Appeals issued an order denying the Petition for Rehearing. On November 8, 1990, the Court of Appeals issued an order vacating the November 6, 1990 order, indicating that it had been issued inadvertently. On November 19, 1990 still another order was issued denying the petition for rehearing. The administrative proceeding is still pending at the MPSC.

The underlying basis of Graff's federal court action is that a provision in the Michigan Motor Carrier Act, MCL 479.10a(6) which requires trucking companies to treat their owner-operators as employees, is unconstitutional under the Commerce Clause and Supremacy Clause. Trucking companies have traditionally regarded their owner-operators as independent contractors. The Interstate Commerce Commission specifically authorizes the maintenance of owner-operator status, and has done so historically. The ICC has promulgated extensive rules at 49 C.F.R. 1057.11-12 governing the relation between owner-operators and motor carriers, but nowhere requires an employee status. Graff's operations are heavily centered in interstate commerce. To treat an owner-operator as an employee involves substantially higher labor costs. Graff must compete in interstate commerce with carriers which do not have this same obligation. Graff maintains the Michigan statutory provision is an undue burden on interstate commerce. Further, it conflicts with federal regulatory treatment, which is supreme in all respects for carriers operating in interstate commerce, as Graff does.

The basis for federal jurisdiction in the court of the first instance is 28 U.S.C. §§ 1331, 1343, 2201, and 2202, as the matter involves a federal constitutional challenge to a state statute.

REASONS FOR GRANTING THE WRIT

1. Prevent the Use of the *Younger* Doctrine as a Manipulative Device to Delay or Prevent the Resolution of Federal Constitutional Claims Involving State Statutes.

This case involves a critical question of federal-state relations, involving as it does the *Younger* abstention doctrine and the bad faith exception thereto. This Court has never decided whether *Younger* abstention is still appropriate, where a state has prevented judicial determination of a federal constitutional issue in not only the federal courts, but the state courts, through legal maneuvering. This Court has also never decided whether *Younger* abstention is appropriate, when a state criminal prosecution has been resolved in defendant's favor, based on lack of constitutionality of a state statute, but the state continues to enforce the statute against the party. These questions are worthy of decision by this Court.

In *Younger*, of course, this Court, based on the notion of "comity" and "our federalism," declared that there would be no federal court intervention with a pending state criminal prosecution, absent a showing of ". . . bad faith, harassment, or any other circumstance that would call for equitable relief". 401 U.S. at 34. The scope of the *Younger* abstention doctrine was expanded beyond pending state criminal prosecutions to civil enforcement proceedings in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592; 95 S.Ct. 1200; 43 L.Ed.2d 482 (1975), where the application of a public nuisance statute to a theater displaying pornographic films was involved[5]. It was

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[5] See, also, in this same regard, *Trainor* v. *Hernandez*, 431 U.S. 434; 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977), involving a civil action by a state department seeking the return of welfare payments alleged to have been obtained fraudulently, and *Moore* v. *Sims*, 442 U.S. 415; 99 S.Ct. 2371; 60 L.Ed.2d 994 (1979), involving state child custody proceedings, in a case of suspected abuse. This court noted in *Trainor* that the option had been available to the state to prosecute the involved parties in criminal pro-

pointed out in *Huffman* that the proceeding was ". . . more akin to a criminal prosecution than are most civil cases" *Id.* at 604.

In *Hicks* v. *Miranda*, 422 U.S. 332; 97 S.Ct. 2281; 45 L.Ed.2d 223 (1975), *Younger* was also applied in a broader context, in that this Court held that the state proceedings did not have to be pending, at the time that the federal case was initiated. In the instant case involving Graff, of course, no state court proceedings were pending at the time that Graff filed its actions. *Hicks*, once again, involved obscenity charges. This court declared at 422 U.S. 349 that:

> . . . We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force.

In the case at hand, there had been no proceedings of substance prior to the institution of the state court criminal proceeding, although some of the Respondents, at least had been served with Graff's U.S. District Court complaint[6].

Younger has been applied in still other contexts by this Court. For example, in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423; 102 S.Ct. 2515; 73 L.Ed.2d 116 (1982), *Younger* abstention was held appropriate, where a state bar disciplinary proceeding

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ceedings, but the state elected to vindicate its important state policies through the civil action. See 431 U.S. at 433. In *Moore*, this court emphasized that an action involving the removal of a child in child-abuse context was closely related to criminal statutes. See 442 U.S. at 423. Again, important state interests were involved.

[6] There were never actual hearings held on any of the issues involved in this case by the U.S. District Court. The matter was decided entirely on the written arguments of counsel.

judicial in nature and within the jurisdiction of the New Jersey Supreme Court had been commenced prior to the institution of the federal court complaint. Further, in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619; 106 S.Ct. 2718; 91 L.Ed.2d 512 (1986), *Younger* was applied to a prior pending proceeding involving a state administrative agency. The lower court, relying upon the two pending, but not prior, state court proceedings in the case at hand, found *Younger* abstention to be appropriate and dismissed Graff's claim without prejudice. In its Motion to Dismiss, Respondents had argued that:

> Plaintiff has state remedies which it may utilize and this issue is the subject of currently pending state district court and state administrative proceedings.

Respondents' Memorandum of Law in Support of Motion to Dismiss Complaint on Grounds of Abstention, p.12. Respondents relied upon both the state district court criminal proceeding and the administrative agency proceeding, as did the U.S. District Court in its opinion. In Respondents' Response to Graff's Motion for a New Trial in the U.S. District Court, Respondents stated, at p.19, as follows:

> Plaintiff argues (memo, p.13) that Defendants have evidenced bad faith and seek to avoid a hearing on the merits in this cause. In response, Defendants' urges (sic) that the state district court proceeding involving the 14 citations issued to Plaintiff was adjourned until December 1, 1989 pursuant to a request by Plaintiff. Thus, it was not the state who seeks to avoid litigating the merits of this case in the state district court proceedings. Rather, it is the Plaintiff who seeks to maneuver this case from the traditional state forums to the federal court.

Respondents further charged that:

> . . . Plaintiff will in all likelihood be attempting to

> persuade both the (state) district court judge, as well as the MPSC that proceedings on the merits in those state proceedings should await a final disposition of this case by the federal court. It is thus the Plaintiff who seeks to prolong and defer the litigation of these cases on the merits in the two pending state proceedings. *Id.*, at 20.

Petitioner had, in response to the initial *Younger* motion argued that the "bad faith" exception to *Younger* applied, and pointed out what had transpired already in *People* v. *CTX*, *supra* and *Central Transport, Inc., et al.* v. *State of Michigan, et al., supra.* Those matters were again presented to the district court, in Graff's Motion for Rehearing and Graff's Memorandum of Law in Support of Motion for New Trial (or Rehearing), at p.14, where the following prediction was made by Petitioner:

> In the event, of course, that the provision is found unconstitutional before a state district court, the people will have the election of not appealing that decision and trying their luck with another citation issued before another district court, claiming all the while that the adverse decision on constitutionality was an aberration and without precedential value in any other district. To allow Defendants to play this game is not, Plaintiff submits, in the interest of justice or fair play. These are extraordinary circumstances, also.

Yet, Graff's argument on bad faith was rejected by the trial court in its initial opinion, and not addressed in its decision on Graff's Motion for Rehearing.

When the arguments regarding the oppressive state tactics concerning both the state and federal challenges to the statutory provision in question were raised before the Court of Appeals, on both brief and oral argument, the court noted that it was ". . . limited to the record before us on appeal". (Appendix A, *infra*, p. 2a). Graff submits that the issue of

bad faith was properly before the U.S. District Court, as well as the Court of Appeals, and, further, that the courts can properly take notice of other court decisions and court pleadings, which proceedings continue to support Graff's contention that the State of Michigan has engaged in a legal war of attrition, for purposes of preserving enforcement of this statute as long as possible. This strategy of Respondents has been singularly successful, as a review of the events reveals. That strategy has been oppressive to Graff and has caused it incredible expense.

Petitioner is aware of no situation in which *Younger* abstention has been deemed appropriate, in a case such as this, where the state has declined to appeal dismissals of state criminal charges, based on federal constitutional challenges, while continuing to enforce the same state law. The State here has, further, utilized procedural arguments, such as exhaustion of administrative remedies, in *Universal*, *supra*, and the existence of another prior and competent state forum, in *Central Transport*, *supra*, to avoid decisions on the merits in state declaratory judgment actions brought in state courts. The state has an appeal by right to the circuit court, as does any other party, from a district court decision, pursuant to MCL 600.8342(1) and (3). Moreover, there is an appeal by application from such a circuit court decision to the Michigan Court of Appeals itself. Concerning the declaratory judgment actions which the State was successful in having dismissed, appeals from the circuit court decisions in those cases proceed directly to the Michigan Court of Appeals, pursuant to MCL 600.308[7]. Here, after Respondents expressly directed the U.S. District Court's attention to the state criminal proceeding, as

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[7] The declaratory judgment device was attacked by Respondents, despite the fact that the courts of Michigan have long favored its use to determine questions such as constitutionality. See, in that regard *Shavers* v. *Attorney General*, 402 Mich. 554, 588; 267 N.W.2d 72 (1978), wherein the court stated that "the declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people."

an avenue which Graff had available in which to raise its constitutional arguments, and the U.S. District Court accepted Respondents' argument in that regard, dismissing on *Younger* grounds, Graff's arguments were presented to the state district court in the context of the criminal charges. Graff prevailed. Yet, Respondents have continued to enforce the statutory provision in question against Graff, as well as other carriers, and continues to prosecute the state administrative proceeding, requesting a variety of draconian relief, even including the assessment of fines[8]. As Justice Scalia, writing for the Court, recently pointed out in *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 491 U.S. 350, 109 S.Ct 2506, 2512; 105 L.Ed.2d 298 (1989),

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.

It was pointed out there, once again, that abstention is "the exception, not the rule". *Id.* at 2513. In its discussion, the Court again noted that the obligation of the federal courts to determine claims within their jurisdiction was "virtually unflagging", as had been stated in *Deakins* v. *Monaghan*, 484 U.S. 193, 203; 108 S.Ct. 523; 98 L.Ed.2d 529 (1988). The bad faith language of *Younger* must be given meaning in Graff's case, if the language of this Court in cases such as *New Orleans* and *Deakins* concerning the federal courts' obligation to rule on cases within their jurisdiction, is to have meaning. In this case, Graff, before the U.S. District Court, successfully predicted the course which Respondents would take, if Graff prevailed in the state district court proceeding. Graff said that such a state court ruling would mean nothing to Respondents. It has meant nothing.

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[8] Fines could have been assessed in the criminal proceeding, but were not, because of the state district court's disposition in *People* v. *Graff*, *supra*. Criminal violations of the Michigan Act are punishable by fines not exceeding $500 or imprisonment for not more than 90 days, pursuant to MCL 479.16.

It is true that, at the time that Petitioner filed its federal court action, it was aware of the continuing interests of State Police Officer Krietemeyer in Graff's method of treatment of owner-operators. Such interest had been expressed for several months. However, for a part of the time that Graff was being investigated, a moratorium by the MPSC was in effect. Also, Graff was aware that the *Central* declaratory judgment action, *supra*, was pending in Wayne County Circuit Court. After that action was dismissed, based on Respondents' motion, Graff concluded that it was necessary for it to file this federal court complaint. However, it is absurd to suggest, as Respondents have argued, that Graff should have known that a formal complaint proceeding would be instituted against it by the MPSC Staff. No formal complaint had ever been instituted by Staff against a carrier for violations of MCL 479.10a(6). The state police, further, issue a multitude of citations against motor carriers each and every year in Michigan for various and sundry Motor Carrier Act offenses, and only a small fraction of these ever result in formal complaint proceedings being instituted against the carrier. Also of note is the admission by Mr. Lonergan, Director of the MPSC Motor Carrier Regulation Staff, in the MPSC proceeding involving Graff, that one of Staff's motivations was to avoid a federal court determination of Graff's Commerce Clause and Supremacy Clause issues[9].

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[9] The following exchange occurred between Mr. Lonergan and Petitioner's counsel, during Mr. Lonergan's cross-examination in the administrative proceeding:

Q: Would I be correct that if I were to ask you questions about your personal knowledge with regard to the factual matters underlying the complaint, that you have not —

A: Very little.

Q: Was part of your reasons for filing the formal complaint against Graff to have available this Commission as a forum to present the factual issues as opposed to a federal court?

A: Yes, I would say it was desired, yes.

When the Court of Appeals below directed Respondents to file a response to Graff's Petition for Rehearing, Respondents, apparently out of a feeling of concern that their tactics might have caught up to them, represented to the Court of Appeals at Note 10, p. 5 of their response that:

> It should also be noted, however, that although the Defendants-Appellees do not recognize either of the three district court decisions as foreclosing or precluding any enforcement of MCL 479.10a(6), Defendants-Appellees have ceased any enforcement activity against any existing operations not in compliance with MCL 479.10a(6) during the pendency of the MPSC proceeding involving Graff and will continue to do so, at least until the Commission's order therein, and perhaps during any pending Court of Appeals review thereof.

A similar representation was made to the administrative law judge before the MPSC in a pleading filed with that agency. The purpose of the representation made by Respondents was to demonstrate to the Court of Appeals that they were not acting in "bad faith". Graff subsequently pointed out to the administrative law judge before the agency that Respondents continued to enforce the statute in question[10]. In response to Graff's charge that enforcement continued, Respondents replied as follows in the administrative proceeding:

> Clearly, Graff has not carefully read the statement contained in footnote 7 (footnote 8 of Respondents' pleading before the Court of Appeals) because that footnote expressly states that Staff has ceased enforce-

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[10] Citations were issued, for example, on October 16 and October 17, 1990 for related offenses in *People* v. *Universal Am-Can, Ltd.*, District Court Nos. 90-003143-ST and 90-003144-ST (52-3 Judicial District) which matters are presently pending before the district court on Motions to Dismiss, because of constitutionality grounds. Other enforcement actions continue to take place against existing carriers by Respondents.

> ment activity against any '*existing*' operations not in compliance with MCL 479.10a(6). Thus, the only enforcement activity that Staff is therefore taking would be in instances where a carrier seeks to augment or add to its illegal operations. In other words, if a carrier currently has 25 leases on file with the MPSC for vehicles it leases from owner-operators, the carrier is still able to renew and obtain decals for those vehicles on an annual basis, even if those leases do not comply with MCL 479.10a(6). However, if a carrier wishes to add more vehicles to its existing fleet, then the Staff has refused to issue decals if the leases that the carrier attempts to file are not in compliance with the Michigan Motor Carrier Act and rules.

This is but another example of Respondents' perfidy. A state which is engaged in this kind of behavior is not entitled to the respect for state functions declared in *Younger*. Involved in this case is the bad faith necessary to justify federal intervention. Involved is the harassment necesssary. Litigants should not be deprived of a federal court forum in which to hear their federal constitutional claims in cases such as this.

Younger elaborates on an important and vital theme in this nation's federal and political system. *Younger* is not an excuse, however, for manipulation by a state of both state and federal judicial proceedings to delay a decision on the merits of an important federal constitutional claim. Some three years after legal proceedings first ensued with regard to this issue, no state or federal trial court has had the issues presented to it on the merits. The only actual trial proceedings, thanks to Respondents' strategy, have been before a state administrative agency which has declared itself incompetent to render a ruling on this very same constitutional issue. Abstention is not appropriate in this instance, and this court should take this opportunity, Graff submits, to inform the states that *Younger* is not to be utilized in this fashion.

2. *Younger* Should not be Extended to Situations like the Instant One, Where No Vital State Interest has been Established.

Younger and its progeny have all examined whether a vital state interest was involved, on behalf of the State. The U.S. District Court, in this proceeding, determined that a vital state interest was involved, which was:

> The protection of its citizens' general health, welfare, and safety by forcing trucking companies, through state statute to be financially accountable for accidents . . . (Appendix B, *infra*, at p. 7a).

No evidence was submitted by Respondents to support this proposition. This finding was based on assertions by Respondents, in their pleadings, signed by Respondents' counsel. Those assertions of Respondents were controverted by Graff. No evidentiary hearings or oral arguments were had before the U.S. District Court. The conclusion of the U.S. District Court that a vital state interest was involved was erroneous.

The statutory provision in question, MCL 479.10a(6), is a small part of the Michigan Motor Carrier Act of 1933, MCL 475.1 *et seq.*, which governs the affairs of Michigan motor carriers. That provision simply states, in relevant part, at MCL 479.10a(6), that:

> The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer.

That section and requirement was not added to the Michigan Motor Carrier Act until the latter half of the 1950's. It was part and parcel of a labor-backed initiative to assist unions in

organizing trucking companies[11]. The "employee" requirement for owner-operators in Michigan has nothing whatsoever to do with the right of a state to control entry or rates in intrastate transportation, however. Graff possesses intrastate authority as required by the Michigan Public Service Commission and has for decades. Graff's formation in 1921 even predates the present Michigan regulatory scheme.

What the state statutory provision does, however, is require a motor carrier to conform all of its operations, including its interstate operations, to an intrastate method of operations which has as its purpose the protection of a labor union. That is not, in Graff's view, a vital state function. The Interstate Commerce Commission has, for years, allowed motor carriers to treat their owner-operators as independent contractors. As was stated by the ICC in *Ex Parte No. MC-122 (Sub. No. 2), Lease of Equipment and Drivers to Private Carriers*, 132 MCC 756, 787 (1952),

> For general legal purposes, we held long ago that a regulated carrier can carry on its service with equipment leased from owner-operators as independent contractors, and it is our understanding that owner-operators are not typically treated as employees for tax purposes when they lease to regulated carriers.

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[11] The bill adding this language was even known as the "Wendell" amendment, after the late Otto Wendell, former governmental Affairs Director for the Teamsters' Union in Michigan. The bill has a union purpose, as *bona fide* independent contractors are not covered by the provisions of the National Labor Relations Act. See 29 U.S.C. § 152(3). In the case of trucking operations, the National Labor Relations Board, in determining whether or not individuals were truly independent contractors, has focused on the "right to control" test, with particular emphasis on the assumption of entrepreneurial risk by the owner-operator. See, in this regard, such cases as *Capital Parcel Delivery Co.*, 269 NLRB 52 (1984); *Don Bass Trucking*, 275 NLRB 1175 (1985); *Precision Bulk Transit, Inc.*, 279 NLRB No. 60, 122 LRRM 1098 (1986), and *Container Transit, Inc.*, 281 NLRB No. 141, 124 LRRM 1349 (1986).

In that same decision, the ICC noted that it had rejected a requirement that owner-operators be employees, as early as its decision in *Dixie Ohio Express Co. Common Carrier Application*, 17 MCC 735 (1939). *Lease of Equipment, supra*, at 780[12]. In addition to specifically holding that motor carriers can treat their owner-operators as independent contractors, the ICC has also promulgated an extensive set of rules, at 49 C.F.R. § 1057.11-12, which establishes in detail the contractual relationship which must exist between a motor carrier and its owner-operators. The employee relationship is not a part of that. Thus, the Michigan statutory requirement is totally contrary to the scheme crafted at the federal level[13]. It imposes substantial additional operational costs on carriers, also.

The fact of the matter is that motor carriers must maintain insurance for their operations and be responsible to the public for those operations, whether or not the motor carriers treat their drivers as independent contractors or employees, pur-

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[12] See also *Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers*, 522 MCC 675 (1951), again supporting the ability of interstate motor carriers to treat their owner-operators as independent contractors. In terms of tax treatment of the owner-operators, see, also, *United States* v. *Silk (Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704; 64 S.Ct. 1463; 91 L.Ed. 1757 (1947), and *United States* v. *Mutual Trucking Co.*, 141 F.2d 655 (6th Cir., 1944), as well as Revenue Ruling 76-226 (1976), which provide guidance as to the parameters under which it is permissible, under the Federal Tax Laws, for motor carriers to treat their owner-operators as independent contractors.

[13] Graff initially posited in these various proceedings that there was no other state which had a requirement similar to Michigan's, based on testimony from its Chairman of the Board concerning Graff's experience as a motor carrier operator over a wide portion of the United States. Respondents have since pointed out that there are two other states, Washington and Rhode Island, which have in effect requirements such as Michigan's, for their intrastate transportation. Clearly, then, the impostion of such a requirement has not been found necessary by the vast majority of states or the federal government, in order to regulate economically intrastate or interstate motor transportation.

suant to federal regulations at 49 C.F.R. § 1043.1. Similarly, the MPSC has promulgated rules setting forth specific requirements for carriers to maintain public liability and property damage insurance for the protection of the public, at R 460.19101. These rules apply to regulated carriers operating in intrastate commerce in Michigan. Graff is one of those carriers. Accordingly, the insurance requirements of this state are already in force as to Graff, separate and apart from any requirement as to the status of the drivers. Further, the safety rules of the United States Department of Transportation, 49 C.F.R. § 390.1 *et seq.*, apply to all commercial motor vehicles, whether or not operated for-hire. Similarly, the rules of the Motor Carrier Division of the Michigan State Police, governing motor carrier safety, R 470.16101, apply to carriers whether or not those carriers are "for-hire". The conclusion of the U.S. District Court, then, was simply wrong. It relied on the incantation of a purpose by the State, for which there is no evidentiary support.

This court has, in the past, recognized the pitfalls in relying upon mere assertions of safety purposes for state requirements which interfere with interstate commerce, by a state, in cases such as *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; 79 S.Ct. 962; 3 L.Ed.2d 1003 (1959), and *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429; 98 S.Ct. 787; 54 L.Ed.2d 664 (1978)[14]. That is why it is necessary for a court to determine whether there is actual evidence which supports a state's contention. No such evidence was presented in this case. The assertion by Respondents' counsel has no basis in law or in fact.

Neither does the interest of a state in maintaining a criminal prosecution have any further relevance, in this particular situation, where the criminal action has been resolved

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[14] See also, along these same lines, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761; 65 S.Ct. 1515; 89 L.Ed.2d 1915 (1945) and *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662; 101 S.Ct. 1309; 67 L.Ed.2d 580 (1981).

in Graff's favor, because of the unconstitutionality of the state statute. There is no vital state interest worthy of protection in the instant case.

What the Michigan statute does, however, is not only assist labor unions, with regard to their organizing efforts of Michigan carriers operating in intrastate commerce, but, further, requires those carriers to either maintain two separate operations, using trucks in interstate commerce for one operation and intrastate commerce for another, or conform all of the carrier's operations to the Michigan dictated method — treating owner-operators as employees. This protects Michigan-based union carriers from competition from other carriers who elect not to operate in intrastate commerce, in that state, because of this requirement. Also, it increases the costs of operations and makes operations inefficient, for carriers operating in both interstate and intrastate commerce, by requiring those carriers to either treat their owner-operators as employees, or, in the alternative, to have two parallel operations, with inefficient equipment usage and worsened service commensurately. That is why this law is defective from both a Commerce Clause and Supremacy Clause standpoint. Yet, no federal court, or state court for that matter, has ruled on the legitimacy of the Michigan statutory provision, in light of the federal constitutional dictates, because of Respondents' legal chicanery. The asserted state interest here is not significant enough to invoke *Younger* abstention, under this court's past precedent. The decision should fall on this ground also.

CONCLUSION

Younger abstention is the exception, not the rule. If citizens are not to be deprived of the protection of the United States Constitution, then, it is necessary for the courts to give *Younger*'s "bad faith" exception meaning, by refusing to allow states to employ abstention as a manipulative device to

delay or prevent altogether a ruling on the merits on the question of the propriety of a state statute under the U.S. Constitution. Michigan's actions, as outlined here, reflect a contempt for the judicial process. It should not be countenanced by this court. This is an important question of federal law, which, in Petitioner's view, has not yet been settled. A state should not be allowed to avoid federal court jurisdiction in ruling on a claim such as is involved here, when the state courts have already ruled, in a criminal proceeding, that the statute in question is unconstitutional. Neither should states be allowed to recite a purpose, such as safety, for which there is no evidence of record, in support of a *Younger* abstention claim. *Younger* should not be allowed to become a shield against legitimate judicial inquiry as to the constitutionality of a state statute under the U.S. Constitution. *Younger* has never been held to mean that. It should not be held to mean that now.

For the reasons expressed, it is respectfully prayed that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

By: /s/ Robert E. McFarland
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Graff Trucking Company, Inc.

Date: February 18, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-2320

NOT RECOMMENDED FOR PUBLICATION

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY; et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
(Decided and Filed August 31, 1990)

Before: JONES and NORRIS, Circuit Judges; TODD, District Judge.*

PER CURIAM. Plaintiff, Graff Trucking Company, Inc., appeals from the judgment of the district court dismissing, upon grounds of abstention, plaintiff's action for injunctive and declaratory relief, and the court's order denying its motion for a new trial.

Having had the benefit of oral argument and having

* The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in dismissing the action without prejudice and in denying the motion for a new trial.

Although there was considerable discussion during oral argument concerning changes in circumstances that may have occurred since this cause was appealed, we are, of course, limited to the record before us on appeal. We note that the action was dismissed without prejudice, and that the district court would be in the position to entertain another filing by plaintiff should defendants engage in conduct which denies plaintiff rights guaranteed it under the United States Constitution. We have every confidence that the defendants will see their duty in that regard, and will not subject plaintiff to unwarranted litigation and expense.

As the reasons why judgment should be entered for defendants have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court dismissing the action without prejudice and the order denying the motion for new trial, are **affirmed** upon the reasoning set out by the district court in its opinion of August 18, 1989.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

JUDGMENT

(Filed August 18, 1989.)

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 18th day of August, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated August 18, 1989, this Court abstains from deciding the merits of this case, and IT IS HEREBY ORDERED that plaintiff's complaint is DISMISSED without prejudice to plaintiff's right to return to this Court if it is not afforded a fair and prompt hearing from the state proceedings.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: August 18, 1989.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

OPINION
(Filed August 18, 1989.)

INTRODUCTION

Plaintiff Graff Trucking Company, Inc. filed this action seeking both a preliminary injunction and declaratory relief against defendants Frank J. Kelley, Attorney General of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission ("MPSC"), Steven M. Fetter and Ronald E. Russell, Commissioners of the MPSC, and Captain Anthony Phillips, Commander of the Motor Carrier Division of the Michigan State Police. Plaintiff claims that Michigan Compiled Laws Annotated Section 479.10a(6) ("Section 479.10a(6)") violates its fourteenth amendment rights and is a violation of the Commerce Clause, article I, section 8, of the United States Constitution. Presently pending before the Court is defendants' motion to dismiss the complaint on the grounds of abstention.

ANALYSIS

In *Younger* v. *Harris*, 401 U.S. 37 (1971), plaintiff brought a civil rights action under Title 28 United States Code Section 1983 in federal district court to enjoin a criminal proceeding pending against him. The Supreme Court held that an ongoing state criminal proceeding may not ordinarily be enjoined by a federal court. *Id.* at 49. *Younger* and its progeny "espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 431 (1982). Underlying *Younger* are the principles of federalism and

> "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . What the concept does represent is a system in which there is sensitivity to legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44.

In *Parker* v. *Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504 (6th Cir. 1987), the Sixth Circuit set forth a three-prong test for determining whether *Younger* abstention should apply in particular case. "First, the court must determine whether state proceedings, including administrative proceedings, are pending. Second, the state proceedings must involve an important state interest. Third, the court must determine whether the state proceedings will af-

ford the plaintiff an adequate opportunity to raise his constitutional claims." *Id.* at 508 (citations omitted).

A. PENDING STATE PROCEEDINGS

The Court is aware of two pending state proceedings, thus the first prong of the *Parker* test is satisfied. Two days after plaintiff filed this action in federal court, the Motor Carrier Division of the Michigan State Police served the plaintiff with fourteen citations for the violation of Section 479.10a(6) which are now pending in the District Court for the Third Judicial District, Centerville, Michigan. In addition, on May 22, 1989, plaintiff was served with a formal complaint now pending before the MPSC.

Although the factual situations of *Younger* and the case at hand are distinguishable, these distinctions do not affect the applicability of *Younger*. The fact that the state proceedings were commenced subsequent to the filing of this action does not automatically preclude *Younger* doctrine abstention. *See Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). In fact, the Supreme Court in *Hicks* held that if the state court proceeding was commenced "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court the principles of *Younger* v. *Harris* should apply in full force." *Id. Hicks* decreased the importance of the race to the courthouse results which previously were dispositive; to do otherwise would "trivialize the principles of *Younger* v. *Harris*." *Id.* at 350.

B. IMPORTANT STATE INTEREST

The legislature in enacting Section 479.10a(6) was attempting to impose liability on parties more likely to be economically capable of covering damages resulting from accidents involving a motor carrier. Section 479.10a(6) provides in pertinent part that where a motor carrier attempts to complement his existing equipment through the leasing of a vehicle, "the lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract,

or arrangement, shall be operated only by persons who are employees of the holder who stand in a relation to the holder as employee to employer." M.C.L.A. § 479.10a(6). The protection of its citizens' general health, welfare and safety by forcing trucking companies, through state statute, to be financially accountable for accidents is an important state function. Thus, the second prong requiring that the state proceedings involve an important state interest also is satisfied.

C. ADEQUACY OF STATE PROCEEDINGS

The final prong of the *Parker* test requires the federal court to determine whether the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims. In this case, the Court finds that plaintiff will be able to raise his constitutional claims in the state proceedings and may appeal any MPSC order to the state court of appeals pursuant to Michigan Compiled Laws Annotated Sections 479.20, 462.26.

Having found all three *Parker* prongs satisfied, the Court is compelled to refrain from interfering with the pending state proceedings under the notions of comity and federalism absent proof of extraordinary circumstances which would bring one of the *Younger* exceptions into play. A federal court may intervene where it otherwise would abstain if the state proceeding is motivated by a desire to harass, if the state proceeding is conducted in bad faith, or where the state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. 53-54.

Plaintiff alleges that there has been a showing of bad faith in this case since this is the first time a formal complaint proceeding has been brought for a violation Section 479.10a(6). However, the Court does not believe that the first prosecution under a statute is sufficient evidence that the action was brought in bad faith. Instead, the Court finds that the state is simply trying to enforce the law to protect its citizens from what it sees as a potential liability loophole.

CONCLUSION

For the reasons stated above, the Court abstains from hearing the plaintiff's claim and permits the state court to address the constitutional challenges against Section 479.10a(6). Accordingly, defendants' motion for abstention is granted and plaintiff's complaint is dismissed without prejudice to plaintiff's right to return to this Court if it is not afforded a fair and prompt hearing.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

OPINION

(Filed October 16, 1989)

Plaintiff Graff Trucking Company, Inc. ("Graff") filed its Motion for a New Trial (or Rehearing) of this Court's Opinion and Judgment dated August 18, 1989, pursuant to Rule 59 of the Federal Rules of Civil Procedure. This opinion dismissed plaintiff's complaint on the grounds that the *Younger* abstention doctrine was applicable. *See Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Younger* v. *Harris*, 401 U.S. 37 (1971). Plaintiff Graff argues that the Supreme Court's recent decision in *New Orleans Pub. Serv., Inc.* v. *New Orleans*, 109 S. Ct. 2506 (1989) ("NOPSI") renders the *Younger* doctrine inapplicable to this case.

This Court has reviewed the parties' memorandums regarding this motion and the *NOPSI* opinion. This Court is of the opinion that the *NOPSI* decision does not affect the result

reached by this Court in its August 18, 1989, Opinion and Judgment. Therefore, the plaintiff's motion is denied.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: October 12, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

ORDER
(Filed October 16, 1989)

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 12th day of October, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

In accordance with the Opinion dated October 12, 1989, IT IS HEREBY ORDERED that plaintiff Graff Trucking Company, Inc.'s motion for a new trial (or rehearing) is DENIED.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ET AL.,
Defendants-Appellees.

ORDER
(Filed November 6, 1990)

BEFORE: JONES and NORRIS, Circuit Judges; and TODD*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN
Clerk

* Hon. James D. Todd sitting by designation from the Western District of Tennessee.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, Attorney General of the State of Michigan; WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission; STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission; RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission; ANTHONY PHILLIPS, Captain, Commander of the Motor Carrier Division of the Michigan State Police,
Defendants-Appellees.

ORDER
(Filed November 8, 1990)

The order filed on November 6, 1990 denying the petition for rehearing and rehearing en banc having been issued inadvertently,

It is ORDERED vacated. The petition for rehearing en banc, response and reply remain pending before the court.

ENTERED PURSUANT TO RULE 8
(b) RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ LEONARD GREEN

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ET AL.,
Defendants-Appellees.

ORDER
(Filed November 19, 1990)

BEFORE: JONES and NORRIS, Circuit Judges; and TODD*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

* Hon. James D. Todd sitting by designation from the Western District of Tennessee.

APPENDIX G

IN THE DISTRICT COURT OF THE
STATE OF MICHIGAN
IN AND FOR ST. JOSEPH COUNTY

File No. 89-1137

THE PEOPLE OF THE STATE OF MICHIGAN
v.
GRAFF TRUCKING, INDIANA DIVISION,
Defendant.

COMMERCIAL VEHICLE, CONDUCTING INTRASTATE FREIGHT MOVES UNDER IMPROPER LEASE

MOTION TO DISMISS

BEFORE THE HONORABLE WILLIAM L. McMANUS

Centreville, Michigan

Wednesday, June 20, 1990 — at about 11:07 a.m.

APPEARANCES:

MR. LEE F. FISHER
Assistant Prosecuting Attorney
Appeared on behalf of the People;

MR. ROBERT E. McFARLAND
Attorney at Law
Appeared on behalf of the Defendant.

Kenneth R. Nelson (CSR-0508)
Official Court Reporter

* * *

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WITNESSES
None

EXHIBITS
None

Centreville, Michigan
June 20, 1990 — at about 11:07 a.m.
(Court and counsel present)

THE COURT: People against Graff Trucking. This is File 89-1137.

It involves a number of citations written to Graff Trucking Company charging violations of Act 254 of the Public Acts of 1933, Michigan Compiled Laws 479.10a, commercial vehicle, conducting intrastate freight moves under improper lease.

The matter this morning is on a motion by the defense to dismiss.

You're Robert McFarland?

MR. McFARLAND: Yes.

THE COURT: You may proceed.

MR. McFARLAND: Your Honor, the subject matter, as the Court has indicated, has to do with an alleged violation by Graff Trucking, an Indiana Division.

One provision of the Motor Carrier Act is a provision which requires trucking companies to use in its leased equipment individuals who stand in relationship to the carrier as employee to employer.

This act is a part of Act 254 of 1933 as amended.

However, this provision was added in 1959, twenty-six years after the Act was initially passed and

* * *

THE COURT: I'm inclined to think, considering the Constitution of the United States and of Michigan and the relationship of Graff Trucking to the drivers, that the opinion of Judge Nelson seems to me to make some sense, and the

argument that this is a burden upon interstate commerce imposed by the State of Michigan and by no one else makes some sense.

Based upon those findings, I'll dismiss these citations based upon merely the fact that Graff Trucking Company doesn't withhold income taxes or FICA from their compensation paid to the drivers.

That does not necessarily mean that they're not employees for all other purposes, and that to require Graff to act or any trucking company to act differently in Michigan and, therefore, impose restraints upon their business in other states in interstate commerce acts to create undue burden in violation of the U.S. Constitution. I won't touch upon the Michigan Constitutional provision regarding object of the original statute and whether or not this economic impact violates that provision.

The matters will be shown as dismissed.

Counsel may prepare an order accordingly, if you wish, and present it to the prosecution for their approval, and I'll sign it.

I'll also return these extra copies. Maybe you can use them for someone else.

MR. FISHER: Thank you, your Honor.

MR. McFARLAND: Thank you, your Honor.

APPENDIX H

STATE OF MICHIGAN
IN THE 3RD DISTRICT COURT, DIVISION TWO

Case No. 89-1137-1-ST

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

GRAFF TRUCKING, INDIANA DIVISION,
Defendant.

ORDER

At a session of said Court, held in the District Court, City of Centreville, County of St. Joseph, Michigan on June 27, 1990.

PRESENT: HON. William L. McManus
District Court Judge

This matter having come on to be heard on Defendant's Motion to Dismiss, and the Court having reviewed the pleadings and arguments of the parties and being fully apprised of the same.

IT IS HEREBY ORDERED AND ADJUDGED that Citation Nos. T-321161—T-32174 charging Defendant with violations of MCL 479.10a are dismissed, for the reasons expressed by the Court in its bench opinion of June 20, 1990, including the grounds that:

1. An employer-employee relationship may be maintained, for purposes of this statute, without the need for the employer to withhold federal and state taxes, etc. (See *People of the State of*

Michigan v. *ABC Cartage Co.*, Case No. 89-002118, Opinion of May 15, 1990); and

2. This statute constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const., Art. I, Section 8.

/s/ WILLIAM L. McMANUS
The Honorable William L. McManus
District Court Judge

APPROVED AS TO FORM:

/s/ LEE F. FISHER
(P-42384)
Assistant Prosecuting Attorney
St. Joseph County
New Courts Building
P.O. Box 250
Centreville, MI 49032-0250
(616) 467-6361

/s/ ROBERT E. McFARLAND
(P17394)
Attorney for Defendant
Graff Trucking, Indiana Div.
2100 North Woodward Avenue
Suite 130
Bloomfield Hills, Michigan 48013
(313) 258-4880

APPENDIX I

CHART OF CASES

A1. *People of the State of Michigan* v. *CTX Division of Central Transport, Inc.*, District Court No. C-88-0736—C-88-0762, 34th Judicial District.

Twenty-five misdemeanor citations issued in January, 1988. Defendant filed a Motion to Dismiss, based on the unconstitutionality of MCL 479.10a(6). The Court issued an order holding the case in abeyance, while Defendant filed state court action for a declaratory judgment in circuit court (A2). When A2 was dismissed, the district court dismissed the twenty-five charges on April 26, 1989. Dismissal was not appealed by State.

A2. *Central Transport, Inc. and its CTX Division* v. *State of Michigan and the Michigan Public Service Commission*, Circuit Court No. 88-816850-CZ, Wayne County Circuit Court.

Based on stay order and stipulation in A1, this action for a declaratory judgment, declaring MCL 479.10a(6) unconstitutional was filed in July, 1988. State moved to dismiss, claiming it was already before a court of competent jurisdiction (A1). State's motion granted, on March 26, 1989.

A3. *Central Transport, Inc.*, File No. C-6714, Case No. 60.

Michigan Public Service Commission Staff intervened in Michigan Public Service Commission application filed in December, 1988, claiming applicant unfit for violations of MCL 479.10a(6). Applicant claimed the statute unconstitutional. The Commission ruled it did not possess power to declare its own statute unconstitutional on January 9, 1990.

B1. *Graff Trucking Company, Inc.* v. *Frank J. Kelley, Attorney General of the State of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission; Steven M. Fetter, Commissioner of the Michi-*

gan Public Service Commission; Ronald E. Russell, Commissioner of the Michigan Public Service Commission; and Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police, U.S. District Court File No. L89-30043-CA, filed May 2, 1989.

This matter is the subject of this appeal.

B2. *People of the State of Michigan* v. *Graff Trucking, Indiana Division*, District Court No. 89-1137 (3-2 Judicial District).

Fourteen misdemeanor citations were issued against Graff on May 4, 1989, for violation of MCL 479.10a(6). Graff filed a Motion to Dimiss, claiming the statute unconstitutional. On June 20, 1990, the court, in a bench opinion followed by an order on June 27, 1990, dismissed the case, ruling that the statute violated the U.S. Constitution. Dismissal not appealed by the State.

B3. *In the Matter of the Complaint Against Graff Trucking Company, Inc., Filed by the Michigan Public Service Commission Staff*, File No. T-1075.

A formal complaint was filed against Graff on May 22, 1989, claiming violations of MCL 479.10a(6), and requesting various relief, including assessment of fines and revocation of Graff's intrastate operating authority. This matter is presently pending before the administrative law judge.

C1. *People of the State of Michigan* v. *ABC Cartage Company*, District Court No. 89-002118 (52-3 Judicial District).

Misdemeanor citations issued against ABC claiming violation of MCL 479.10a(6). ABC claimed the MPSC interpretation went beyond statutory requirements. District court agreed and dismissed on May 15, 1990. Dismissal not appealed by the State.

D1. *Universal Am-Can, Ltd.* v. *Frank J. Kelley, Attorney*

General of the State of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission; Steven M. Fetter, Commissioner of the Michigan Public Service Commission; Ronald E. Russell, Commissioner of the Michigan Public Service Commission; and Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police, Circuit Court No. 89-3884-AW, (Macomb County Circuit Court).

On September 22, 1989, Universal filed a complaint seeking a declaratory ruling that MCL 479.10a(6) was unconstitutional. The State moved to dismiss, claiming Universal should file a petition for declaratory ruling with Michigan Public Service Commission. Motion for dismissal granted on January 19, 1990 (see however, A3). The matter is presently pending before Michigan Court of Appeals. Issue is propriety of dismissal on exhaustion grounds.

D2. *People of the State of Michigan* v. *Universal Am-Can, Ltd.*, District Court Nos. 90-003143-4-ST (52-3 Judicial District).

Two misdemeanor citations issued against Universal for violations of Michigan Motor Carrier Act on October 16, 1990, with issue of the same statutory provision involved. Motion to Dismiss filed by Universal, based on the unconstitutionality of the statute. Motion pending.

APPENDIX J

STATE OF MICHIGAN
IN THE 34TH DISTRICT COURT COUNTY OF WAYNE

District Court No. C88-0736, C-88-0737, C88-0738, C88-0739, C88-0742, C88-0743, C88-0744, C88-0745, C88-0746, C88-0747, C88-0748, C88-0749, C88-0750, C88-0751, C88-0752, C88-0753, C88-0754, C88-0755, C88-0756, C88-0757, C88-0758, C88-0759, C88-0760, C88-0761, C88-0762

PEOPLE OF THE STATE OF MICHIGAN
v.
CTX, DIVISION OF CENTRAL TRANSPORT, INC.,
Defendant.

HEARING

BEFORE THE HONORABLE KALEM GARIAN,
DISTRICT JUDGE

Romulus, Michigan — Wednesday, April 26, 1989

APPEARANCES:

For The People: MS. DENISE D. GREEN P35194
3000 Henry Ruff Road
Westland, Michigan 48185
(313) 278-8310

RECORDED BY: Susanne L. Hughes, CER 3415
Certified Electronic Recorder
(313) 941-4462

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WITNESSES: PEOPLE
None.

EXHIBITS:
None.

[3] Romulus, Michigan
Wednesday, April 26, 1989 — at 11:38 a.m.

THE COURT: What are you going to do with those 25 cases?

MS. GREEN: What 25 cases?

THE COURT: The ones that were handed to you.

MS. GREEN: Oh, I haven't even looked at them yet, your Honor.

THE COURT: All right. Well, you don't have to. They should be dismissed. There's a Circuit Court Order ruling that those — it's illegal for the — to have charged — what was it, the driver or something on that one? They found out that some Circuit Judge has already made a ruling on it. That's why they just brought it back here.

MS. GREEN: I'll look —

THE COURT: You can look at it.

(At 11:38 a.m., court recessed)

(at 11:42 a.m., court reconvened)

THE COURT: This was a case of 25 cases against CTX, Division of Central Transportation, Incorporated. Let the record reflect this case is now brought — brought back before this Court after the Circuit Court had made a ruling in which would be binding on this Court, and that is that there can be a leasing agreement without the employer-employee relationship.

MS. GREEN: Um hum (affirmative response).

[4] THE COURT: This required a leasing arrangement only between employer-employee in the Circuit Court ruling. This Court's going to dismiss all 25 cases.

MS. GREEN: Thank you, your Honor.
(At 11:46 a.m. proceedings concluded)

CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I certify that this transcript, consisting of 5 pages, is a complete, true, and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case on April 26, 1989.

April 16, 1990

/s/ SUSANNE L. HUGHES CER 3415
11131 S. Wayne Road
Romulus, Michigan 48174

APPENDIX K

STATE OF MICHIGAN
IN THE 52-3 JUDICIAL DISTRICT

Case No. 89-002118

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

ABC CARTAGE COMPANY,
Defendant.

OPINION

The Defendant was charged with improper leasing under Act 254. This case came to trial on March 7, 1990. Stipulated facts were placed on the record and both parties given thirty days to present briefs.

The issue is whether drivers who don't have their state and federal taxes withheld from their wages by the Defendant are employees or contractors? The Court finds that is not sufficient to prove guilt beyond a reasonable doubt. Therefore, the Defendant is found not guilty.

In this case the Defendant hired several persons who supervised the delivery of the Defendant's merchandise out of the Defendant's warehouse. The prosecutor relies on an opinion of the Public Service Commission, which requires not only the control over these people that an employer usually exercises but that the state and federal taxes be withheld from these drivers or they are not employees.

The Court concedes to the prosecutor that an employer is required to withhold certain state and federal taxes from employees. The failure to do so would be some proof that they are not considered employees by the employer or driver.

However, it is just as easy and even easier for the taxing agencies to find that, if the requisite control that denotes an employer agreed to by the parties in their stipulations were present, they would find the Defendant was liable for withholding. Therefore, the Court finds that the Commission opinion is not binding.

Further, the Court concludes that the failure to withhold state and federal taxes is of less value than the exclusive control of the drivers. Since the intent of the legislation is to regulate the activity, the actual control of the driver's activity is of utmost importance, not the failure to comply with tax laws; which have no bearing on the driver's activities.

Dated: May 15, 1990

/s/ RALPH H. NELSON
District Judge

APPENDIX L

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE
34th JUDICIAL DISTRICT

Case Nos. T-220501—T-220525

PEOPLE OF THE STATE OF MICHIGAN
v.
CTX, DIVISION OF CENTRAL TRANSPORT, INC.,
Defendant.

Andrew S. Telek (P-21320)
Assistant Wayne County Prosecutor
Attorney for the People
3000 Henry Ruff Road
Westland, Michigan 48185

Robert E. McFarland (P-17394)
McFarland & Bullard
Attorney for Defendant
CTX Division of Central Transport, Inc.
2100 North Woodward Avenue
Suite 130
Bloomfield Hills, Michigan 48013

MOTION AND STIPULATION OF PARTIES TO HOLD MATTERS IN ABEYANCE

NOW COME People of the State of Michigan, by Andrew S. Telek, Assistant Wayne County Prosecutor, and CTX Division of Central Transport, Inc., by its attorney Robert E. McFarland, and hereby move and stipulate as follows:

1. On or about January 21, 1988, 25 citations were issued against Defendant in the above-referenced proceedings, alleging improper leasing agreements, lacking an employee-employer relationship existing between Defendant and certain of its drivers, in violation of MCLA 479.10(a)(6) of the Michigan Motor Carrier Act, Public Act 254 of 1933, as amended.

2. Defendant entered its plea of not guilty to the charges and, on or about March 31, 1988, filed with the court a Motion to Dismiss, Affidavit in Support Thereof, and Brief in Support of Motion to Dismiss.

3. In open court on April 27, 1988, a discussion ensued between the parties, at which time it was agreed that Defendant would, in the interest of judicial economy, and in order to expedite these proceedings, file a Complaint for Declaratory Judgment with the Circuit Court for the County of Wayne, in order to obtain a decision on the merits of the matters raised in its Motion to Dismiss, which is grounded in both federal and state constitutional claims. It was noted by Defendant's counsel that the issues involved herein are of statewide significance and importance to the regulated motor carrier industry in Michigan generally. It was agreed by the parties, with the concurrence of the court, that the 25 citations would be held in abeyance, while the Petition for Declaratory Judgment is pending.

WHEREFORE, the parties stipulate and move that these 25 citations be held in abeyance by the District Court for the 34th Judicial District, while the Complaint for Declaratory Judgment is pending and that Defendant CTX Division of Central Transport, Inc. will file by July 10, 1988, a Complaint for Declaratory Judgment with the Circuit Court for

the County of Wayne, concerning the federal and state constitutional issues which underlie its Motion to Dismiss.

/s/ ANDREW S. TELEK
Andrew S. Telek
Assistant Wayne County Prosecutor
Attorney for the People of the State of Michigan
3000 Henry Ruff Road
Westland, MI 48185

Robert E. McFarland
McFarland & Bullard
Attorney for Defendant
CTX Division of Central Transport, Inc.
2100 North Woodward
Suite 130
Bloomfield Hills, MI 48013

Dated: June 23, 1988

ORDER

At a session of said court held in Romulus, Michigan on the 29th day of June, 1988

PRESENT: JAMES B. STONE
The Honorable James B. Stone
District Court Judge

This court having read the attached Stipulation and Motion of the parties, and being fully apprised of the issues herein; and it appearing that it would further the interest of justice and judicial economy for Defendant CTX Division of Central Transport, Inc., to seek a resolution of the constitutional issues involved in these proceedings by filing a Complaint for Declaratory Judgment with the Circuit Court for the County of Wayne, in order to obtain the most expeditious resolution of the issues involved,

IT IS HEREBY ORDERED AND ADJUDGED that Case Nos. T-220501—T-220525 be held in abeyance while Defendant CTX Division of Central Transport, Inc. pursues its Complaint for Declaratory Judgment.

/s/ JAMES B. STONE
The Honorable James B. Stone
District Court Judge

Dated: June 23, 1988

APPENDIX M

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Hon. Wm. Leo Cahalan (P11509)
Case No. 88-816850-CZ

CENTRAL TRANSPORT, INC., and its CTX DIVISION,
Plaintiffs,

v.

STATE OF MICHIGAN and the MICHIGAN PUBLIC SERVICE COMMISSION,
Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION.

OPINION

This case arises from a cause pending in the Thirty-Fourth (34th) District Court. Central Transport, Inc. was therein charged with some twenty-five citations for violations of Michigan Public Service Commission rules attending the operation of a trucking company. Plaintiff has filed the instant action to secure a judgment under MCR 2.605(A) declaring that MCLA 479a6 (forming the basis for the citations below) is unconstitutional. The State of Michigan and the Michigan Public Service Commission have filed this motion for summary disposition.

The identical issues before this Court now are pending in the Thirty-Fourth (34th) Judicial District. That Court is fully competent to adjudicate the questions. For this Court to ar-

rogate that function to itself would constitute an abuse of discretion.

> While plaintiff raises 14 questions in his petition, they relate to matters that may be presented in the criminal case that is pending. We condemn the practice of a person who, after being charged with violating the law, then asks for a declaratory judgment in an independent cause, with the result that two cases involving the same subject matter are pending at the same time. If such a practice were permitted, it would cast an unnecessary burden on the courts and the law enforcement authorities. The general rule is set forth in *Woolard* v. *Schaffer Stores Co.*, 272 NY 304, 311 (5 NE[2d] 829, 109 ALR 1262); 273 NY 527 (7 NE[2d] 676, 109 ALR 1267), where Justice O'Brien said:
>
> > "When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction. *Colson* v. *Pelgram*, 259 NY 370 (182 NE 19)."
>
> A declaratory judgment is not a substitute for regular actions. *Washington-Detroit Theatre Co.* v. *Moore*, 249 Mich 673 (68 ALR 105); *Village of Grosse Pointe Shores* v. *Ayres*, 254 Mich 58; *Miller* v. *Siden*, 259 Mich 19. One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights. *City of Flint* v. *Consumers Power Co.*, 290 Mich 305. Plaintiff is first charged with violating the law; then he asked for a declaratory judgment in an independent proceeding while the criminal suit was still pending. Borchard in his work on Declaratory Judgments, p 179, states as follows:

> "Yet where a suit or proceeding is already pending involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit. * * * The first court seized of the issues involved, if identical, whether by action for declaratory or other judgment, must be permitted to retain jurisdiction of the case." *Updegraff* v. *Attorney General*, 298 Mich 48, 51, 52 (1941); see also *Com'r of Revenue* v. *GTWR Co.*, 326 Mich 371 (1949);

Consistent with the preceding, defendants' motion for summary disposition shall be GRANTED.

/s/ WILLIAM LEO CAHALAN
Judge, Third Judicial Circuit

March 22, 1989

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

Hon. William Leo Cahalan (P11509)
Case No. 88-816850-CZ

CENTRAL TRANSPORT, INC., and its CTX DIVISION,
Plaintiffs,

v.

STATE OF MICHIGAN and the MICHIGAN
PUBLIC SERVICE COMMISSION,
Defendants.

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan on March 22, 1989

PRESENT: HON. WILLIAM LEO CAHALAN
Circuit Judge

Being fully avised in the premises, after plenary review and consistent with the tenor of the foregoing Opinion,

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary disposition is GRANTED.

This Court retains no further jurisdiction.

/s/ WILLIAM LEO CAHALAN
Circuit Judge

APPENDIX N

[LETTERHEAD OF McFARLAND & BULLARD]

April 18, 1989

The Honorable James B. Stone
District Court Judge
34th Judicial District
11131 South Wayne Road
Romulus, Michigan 48174

Re: Central Transport, Inc., and its CTX Division v. State of Michigan and the Michigan Public Service Commission, Case No. 88-816850-CZ; People of the State of Michigan v. CTX Division of Central Transport, Inc., Case Nos. T-220501—T-220525

Dear Judge Stone:

As you will recall, the Motor Carrier Division of the Michigan State Police issued 25 citations against the CTX division of Central Transport, Inc. in January of 1988, alleging improper leasing agreements, lacking an employer-employee relationship between Defendant and certain of its drivers in violation of MCL 479.10(a)(6) of the Michigan Motor Carrier Act, 1933 P.A. 254, as amended. On March 31, 1988, Defendant filed with the Court a Motion to Dismiss, Affidavit in Support Thereof and Brief in Support of Motion to Dismiss. On April 27, 1988, after a discussion between your Honor, Assistant Wayne County Prosecutor Andrew S. Telek, and me, it was agreed that Defendant would, in the interest of judicial economy, and in order to expedite the proceedings, file a Complaint for Declaratory Judgment with the Wayne County Circuit Court, raising the federal and state constitutional grounds which Defendant had earlier relied upon in its Motion to Dismiss before this Court. On

June 29, 1988, an order was entered, holding the citations in abeyance while Defendant CTX division of Central Transport, Inc. pursued its Complaint for Declaratory Judgment in the Wayne County Circuit Court.

In response to the complaint, the Attorney General filed a Motion for Summary Disposition or in the Alternative Motion for Change of Venue, to which Central Transport responded. The parties appeared in Wayne County Circuit Court on September 30, 1988 to argue the motion, at which time no oral arguments were heard, as Judge William Leo Cahalan indicated to the parties that he wished to adjourn the matter to further study the legal positions of the parties. He also allowed the parties to submit any additional authority to which they wished to address his attention.

Thereafter on March 22, 1989, Judge Cahalan granted Defendants' Motion for Summary Disposition. Attached is a copy of the Opinion and Order. Judge Cahalan noted as follows at p. 2 of his Opinion:

> The identical issues before this court now are pending in the Thirty-fourth (34th) Judicial District. That court is fully competent to adjudicate the questions. For this court to arrogate that function to itself would constitute an abuse of discretion.

It had been the position of my client that the cases relied upon in support of Judge Cahalan's decision were distinct on their facts and distinguishable, and that in those cases, the parties had not agreed to hold a district court matter in abeyance and the district court had not stayed its proceedings, in the interest of judicial economy, as is the situation here. However, again with a view to obtaining the quickest possible resolution of this matter we have not appealed Judge Cahalan's decision, as it turns on only a narrow legal point, not related to the merits of the constitutional claims raised by my client, and an appeal to the Court of Appeals would necessarily involve further delay, with only the possibility of a remand to the Wayne County Circuit Court held out.

Accordingly, we would respectfully request that our Motion to Dismiss be considered as soon as possible, in accordance with the decision of Judge Cahalan. Thank you for your consideration in this matter.

Very truly yours,
/s/ ROBERT E. McFARLAND

REM/mam
Enclosure
cc: Mr. Andrew S. Telek
Mr. James D. Payne

APPENDIX O

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC
SERVICE COMMISSION

File No. C-6714
Case No. 60

In the matter of the application of CENTRAL TRANSPORT, INC. for an extension of operations as a common carrier of property, intrastate.

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 9th day of January, 1990.

PRESENT: Hon. William E. Long, Chairperson
Hon. Steven M. Fetter, Commissioner
Hon. Ronald E. Russell, Commissioner

OPINION AND ORDER

* * *

III.

DISCUSSION

* * *

Finally, Central excepts to the ALJ's conclusion that Central's constitutional challenge to MCL 479.10a(6) is an issue for the courts to resolve and, therefore, should not be addressed in this case. However, consistent with our January 3, 1979 order in File No. L-11332, the Commission does not have the power, under the Constitution, to rule a statute unconstitutional. Only the courts have the power to find

legislative action unconstitutional. Therefore, the Commission declines to address Central's constitutional challenges

* * *

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ William E. Long
Chairperson

(SEAL)

/s/ Steven M. Fetter
Commissioner

/s/ Ronald E. Russell
Commissioner

By the Commission and pursuant to
its action of January 9, 1990.

/s/ Dorothy Wideman
Its Executive Secretary

APPENDIX P

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

File No. 89-3884-AW

UNIVERSAL AM-CAN, LTD.,

Plaintiff,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, WILLIAM E. LONG, Chairperson of The Michigan Public Service Commission, STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission, RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission, THOMAS R. LONERGRAN, Director of Motor Carrier Regulation of the Michigan Public Service Commission, and CAPT. ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for a writ of mandamus and/or preliminary injunction as well as defendants' motion for summary disposition, or in the alternative, for change of venue.

Plaintiff filed this action, on September 22, 1989 via a complaint for preliminary and permanent injunction, mandamus, and declaratory judgment alleging the defendants had not enforced MCL 497.10(a)(6) which provides that only employees can operate vehicles, not independent contractors for many

years. Plaintiff alleges it attempted to add equipment to its fleet on September 8, 1989, tendered the fees but was informed it could no longer add equipment for use in Michigan intrastate commerce for the reason that plaintiff's drivers were not employees but independent contractors. Plaintiff argues the statute does not require drivers of carrier-owned equipment to be employees of the carrier, that Michigan Public Service Commission had announced it would interpret the statutory provision to allow independent contractors, that the procedure followed by defendants is unlawful and that the enabling legislation is unconstitutional.

In their motion for summary disposition, defendants argue this Court has no subject matter jurisdiction over matters which should be properly brought before the Michigan Public Service Commission and the Court of Appeals, that plaintiff failed to exhaust available administrative remedies and that this Court is constitutionally prohibited from issuing injunctive relief. Defendants also assert, in the alternative, that mandamus and injunctive relief is inappropriate.

Plaintiff argues this Court has subject matter jurisdiction under the constitution and statutes of Michigan and that constitutional questions can only be brought in court and not before the administrative agency.

The Court is satisfied summary disposition is appropriate not only because this Court lacks jurisdiction over an action challenging the validity of Michigan Public Service Commission action but also because plaintiff has failed to exhaust reasonable and available administrative remedies.

The Court is satisfied the Michigan Public Service Commission is vested with exclusive original jurisdiction to regulate motor carrier operations in intrastate commerce. MCL 460.6(1). Under MCL 462.26(1), any common carrier or other party in interest, being dissatisfied with any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within thirty days from the issuance and notice of that order file an appeal as of right in the Court of Appeals. Under MCL 462.26(4) no injunction

shall issue except upon application to the Court of Appeals following notice to the Commission and a hearing. It is obvious from plaintiff's pleadings and brief that plaintiff seeks to challenge an action of the Michigan Public Service Commission, that is, the change in procedure to deny issuance of decals to operate motor vehicles in intrastate commerce until the carrier complies with the statutory requirement that drivers be employees of the carrier. A well established and exclusive administrative remedy was available to plaintiff but was not pursued. Instead plaintiff has filed this collateral attack in circuit court. Plaintiff seeks to bolster its position by arguing the underlying legislation relating to employees is unconstitutional. The Court is satisfied the mere assertion of a constitutional argument is insufficient to divest the Michigan Public Service Commission from jurisdiction. As is ably pointed out by defendants in their briefs, a constitutional challenge may be brought before the administrative agency and be preserved for adjudication in a court of law on appeal to the Michigan Court of Appeals.

Since the Court finds it has no subject matter jurisdiction over plaintiff's challenge to actions of the Michigan Public Service Commission and plaintiff has failed to exhaust its administrative remedies, summary disposition should be and the same hereby is GRANTED defendant pursuant to MCR 2.116(C)(4) and (7). As a result, the request for a preliminary injunction and/or a writ of mandamus need not be addressed. Plaintiff's complaint should be and the same hereby is DISMISSED with prejudice.

IT IS SO ORDERED.

/s/ FREDERICK D. BALKWILL
Circuit Court Judge

DATED: January 19, 1990.

cc:
Robert E. McFarland
Don L. Keskey/Richard M. Karoub

APPENDIX Q

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

File No. 89-3884-AW

UNIVERSAL AM-CAN, LTD.,

Plaintiff,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, WILLIAM E. LONG, Chairperson of The Michigan Public Service Commission, STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission, RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission, THOMAS R. LONERGRAN, Director of Motor Carrier Regulation of the Michigan Public Service Commission, and CAPT. ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for rehearing pursuant to MCR 2.119(F).

Plaintiff seeks rehearing of the Court's Opinion and Order dated January 19, 1990 in which the Court held it has no subject matter jurisdiction over plaintiff's challenge to actions of the Michigan Public Service Commission. The Court found plaintiff had failed to exhaust its administrative remedies since it had not pursued remedies before the Michigan Public Service Commission to conclusion. The Court did not find the

assertion of a constitutional challenge to the underlying legislation persuasive because it appeared to the Court a constitutional challenge may be brought before the administrative agency and preserved for adjudication in a court of law on appeal to the Michigan Court of Appeals.

Plaintiff seeks rehearing on the ground the Michigan Public Service Commission has ruled definitively as recently as January 9, 1990 that it is without jurisdiction to consider the constitutionality of its own enabling legislation.

In order to obtain rehearing pursuant to MCR 2.119(F) the moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. A motion which merely presents the same issues ruled upon by the Court will not be granted.

Plaintiff merely presents the same issues already ruled upon by the Court. The recent decision by the Michigan Public Service Commission in which it states it does not have the power to rule a statute unconstitutional is cumulative to authority previous cited by plaintiff. As with many questions of law, there is room for a difference of opinion as to whether the Michigan Public Service Commission is the appropriate venue to initiate constitutional claims relating to motor carrier enforcement or whether collateral attacks raising constitutional claims are appropriate in the various circuit courts. Plaintiff has not convinced the Court it has committed palpable error by determining the claim must first be preserved before the Michigan Public Service Commission and then be resolved by a Court of competent jurisdiction on appeal to the Michigan Court of Appeals. If the Michigan Public Service Commission takes enforcement action following the administrative proceeding its action is appealable to the Michigan Court of Appeals and plaintiff may adjudicate the question of whether the Michigan Public Service Commission is attempting to enforce an unconstitutional statute at that level. Independent collateral attacks upon Michigan Public Service Commission actions in the various circuit courts leads to a plethora of

litigation divorced from the administrative proceedings with which they are more properly associated.

For the reasons set forth above, plaintiff's motion for rehearing should be and the same hereby is DENIED.

IT IS SO ORDERED.

/s/ FREDERICK D. BALKWILL
Circuit Court Judge

DATED: March 7, 1990.

cc:
Robert E. McFarland
Don L. Keskey

(2)

No. 90-1328
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

Supreme Court, U.S.
FILED
MAR 26 1991
OFFICE OF THE CLERK

GRAFF TRUCKING COMPANY, INC.,

Petitioners,

v.

FRANK J. KELLEY, Attorney General of the State of Michigan; WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission; STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission; RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission; and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I

WHETHER THE COURTS BELOW LAWFULLY AND PROPERLY APPLIED THE YOUNGER ABSTENTION DOCTRINE TO THIS CASE WHERE THERE IS A VITAL STATE INTEREST INVOLVED AND A PENDING STATE PROCEEDING WILL ADEQUATELY RESOLVE THE ISSUES RAISED IN THE PETITION.

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STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Michigan Motor Carrier Act, 1933 P.A. 254, as amended, M.C.L. 475.1 et seq; M.S.A. 22.531 et seq, (specifically M.C.L. 479.10a(6); M.S.A. 22.575(1)), 1909 P.A. 300, as amended, M.C.L. 462.26; M.S.A. 22.45 and the Interstate Commerce Act, 49 U.S.C. § 10521(b).

STATEMENT OF THE CASE

This case concerns a Michigan statutory provision enacted under Michigan's police powers to promote the health, safety, and welfare of the general public. The specific provision at issue is aimed at promoting the safety, accountability and economic fitness of trucking companies and truck drivers by requiring that when trucks are operated under a lease in Michigan, they shall be

operated only by persons who are employees of the motor carrier.[1]

Since at least January, 1986, Petitioner Graff Trucking Co., Inc. ("Graff") has failed to bring its intrastate leases into compliance with 10a(6). On January 7, 1986, Graff first received written notice of these violations and on July 1, 1988, an officer of the Michigan State Police Motor Carrier Enforcement Division ("SP/MCD") directed Graff to bring its operations into compliance. On April 19, 1989 and May 1, 1989, the SP/MCD conducted follow-up investigations of Graff and determined that Graff was still not complying with 10a(6). On

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[1]M.C.L. 479.10a(6); M.S.A. 22.575(1) ["10a(6)"], of the Michigan Motor Carrier Act, 1933 P.A. 254, as amended.

May 4, 1989, the SP/MCD served Graff with 14 citations based on hundreds of alleged violations of 10a(6).[2]

During its investigation, the SP/MCD also contacted the Michigan Public Service Commission ("MPSC") Staff Motor Carrier Compliance Section ("MPSC Staff") and notified them of the results of their investigation and that citations were issued. Based on these alleged violations, the MPSC Staff on May 22, 1989, initiated a formal administrative complaint proceeding (MPSC File No. T-1075) against Graff at the MPSC alleg-

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[2]Although these citations were subsequently dismissed by order of the 3rd District Court, St. Joseph, Michigan (Pet App 18a-19a), that dismissal took place after the district court below had issued its abstention order.

ing violations of 10a(6).[3]

The MPSC complaint proceeding is a common approach taken by the MPSC Staff when it learns of extensive violations of Michigan's Motor Carrier Act, and provides Graff with formal contested case procedures to permit the presentation of facts, legal issues, and defenses con-

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[3]Pursuant to the MPSC Rules of Practice and Procedure, Mich. Ad. Code R. 460.31 et seq (1968) and §14 of the Motor Carrier Act, M.C.L. 479.14; M.S.A. 22.579, a party may file a formal complaint against a motor carrier for alleged violations of the Act.

cerning the matters raised in this case.[4]

Following the April investigation by the SP/MCD, Graff filed a Complaint in Federal District Court, Western District of Michigan seeking a declaration that 10a(6) was unconstitutional.[5] Respon-

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[4]An MPSC contested hearing concerning 10a(6) and the factual issues involving Graff has been completed and comprises 1,700 pages of transcript, 172 exhibits and briefs totalling over 400 pages of text. A 66-page Proposal for Decision by the Administrative Law Judge assigned to hear the case was issued on March 6, 1991 finding Graff to be in violation of 10a(6) and recommending various remedies. Graff and all other parties can now appeal this PFD to the MPSC itself pursuant to M.C.L. 24.201; M.S.A. 3.560(101) and M.C.L. 24.281; M.S.A. 3.560(181). Under Section 26, 1909 P.A. 300, as amended, M.C.L. 462.26; M.S.A. 22.45, parties may then seek judicial review by right, and injunctive relief, from the MPSC's final order in the Michigan courts.

[5]Graff v. Frank J. Kelley, et al., U.S.D.C. No. L-89-30043-CA.

dents' Motion to Dismiss on grounds of abstention was granted by the court on August 18, 1989 pursuant to an Opinion and Judgment Dismissing Complaint [Pet App 3a-8a]. The court subsequently denied Graff's Motion for Rehearing pursuant to an Opinion and Order dated October 16, 1989 [Pet App 9a-11a)]. On August 31, 1990, the panel of the Sixth Circuit affirmed the district court decision [Pet App 1a-2a]. Graff then filed a petition for rehearing which was denied pursuant to order dated November 19, 1990 [Pet App 14a].

SUMMARY OF ARGUMENT

The decisions of the court of appeals and the district court below are supported by several decisions of this Court recognizing the appropriateness of fed-

eral court abstention in the circumstances presented. The decisions below clearly do not conflict with decisions of this Court or of other U.S. Circuit Courts of Appeal. Thus, further review by this Court is not warranted.

All of the criteria supporting abstention and requiring exhaustion of state remedies exist in this case. Graff has raised both state and federal constitutional claims predicated on application of Michigan's Motor Carrier Act. However, it has not given the MPSC, the agency having extensive experience in administering the Michigan Motor Carrier Act, or the state appeals court assigned the duty to review all final MPSC orders appealed, the opportunity to decide any of these issues. Since motor carrier

regulation by the state is complex and pervasive, the policy problems involved here transcend this case as any judgment rendered will apply equally to others. An administrative proceeding concerning the issues in this case is nearing completion. A clear and swift path to judicial review of any formal MPSC order concerning all issues in this case, based upon the evidentiary record, is guaranteed by right under state law, specifically M.C.L. 462.26.

Thus, this case is well suited for application of the abstention and exhaustion of remedies doctrines as undertaken by the lower federal courts.

ARGUMENT

A. The Decisions Below Properly Found That Younger Abstention Was Appropriate in this Case.

1. The Younger Doctrine.

The decisions below held that the abstention doctrine originating in Younger v. Harris, 401 U.S. 37 (1971), applies to this case.[6] Although Younger involved a state criminal proceeding, the abstention principle has been extended to state civil and administrative proceedings in which important state interests are involved.[7]

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[6]In Younger, this Court found that unless bad faith or harassment was present, principles of federalism require dismissal of a request for equitable relief based on federal issues.

[7]Trainor v. Hernandez, 431 U.S. 434 (1977); Huffman v. Pursue Ltd., 420 U.S. 592 (1975); Ohio Civil Rights Comm. v. Dayton Christian Schools, 477 U.S. 619 (1986).

Subsequent decisions interpreting Younger have held that interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state proceedings that concern important state interests. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 on remand Midkiff v. Tom, 740 F.2d 15 (1984).[8]

Finally, as conceded by Graff in its petition, the Younger doctrine is not

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[8]The respect for state processes included in the notion of "comity", and which underlie the Younger abstention doctrine, precludes any presumption that state courts will not safeguard federal constitutional rights. See Middlesex County Ethics Committee v. Garden State Bar Assoc., 457 U.S. 423 on remand 684 F.2d 801 (1982). The Supreme Court's reasoning in the Middlesex case should dispose of any claims by Graff that the MPSC or state appeals court are not adequate forums for Graff's federal constitutional claims.

limited to instances where state proceedings are pending on the day the federal case is filed, but also applies where state proceedings are begun against a federal plaintiff after the federal complaint is filed but before any proceedings of substance on the merits have occurred in the federal court. Hicks v. Miranda, 422 U.S. 332 (1975).

Petitioner's claims were fully presented to the district court below, and it proceeded to properly apply the three-prong Younger abstention test established in Parker v. Commonwealth of Kentucky, Board of Dentistry, 818 F.2d 504 (6th

Cir. 1987).[9] The district court found all three Parker requirements satisfied.[10]

The decisions below properly concluded that: Michigan has a clear and unequivocal interest in the regulation of

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[9]The Parker absention test requires as follows: "First, the Court must determine whether state proceedings are pending. Second, the state proceedings must involve an important state interest. Third, the Court must determine whether the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." 818 F.2d at 508.

[10]The first part was met primarily because of the MPSC proceeding, and also because of the state district court proceeding. The Michigan legislature satisfied the second item by passing the Michigan Motor Carrier Act, including the section contested by Petitioner, to protect the health, safety and welfare of its citizens. The third portion of the test was met because Petitioner Graff can "raise its constitutional claims in the state proceedings and may appeal any MPSC order to the state court of appeals." Opinion, p. 4. [Pet App 7a].

motor carriers; the MPSC is much better able to formulate a record, gather facts and then decide whether Graff has violated the relevant statute; the constitutionality of the questioned statute would only arise after a determination was made that Graff violated it; an adverse decision could be appealed and even enjoined by the appropriate state court; and finally, all the issues, including federal and state constitutional questions, can be readily addressed by the state courts.

Therefore, the decisions below properly determined that Younger abstention was appropriate especially since Graff has state remedies which it may utilize and the matter is presently being

litigated before the MPSC.[11]

2. The Pullman Doctrine.

The abstention doctrine established in Railroad Comm of Texas v. Pullman Co,

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[11]Graff's federal district court complaint sought declaratory relief with regard to the application of a state statute administered by the MPSC. Section 63 of the Michigan Administrative Procedures Act, M.C.L. 24.263; M.S.A. 3.560(163), provides a reasonable state administrative remedy for obtaining such declaratory relief. Thereafter, the party may appeal the administrative agency's ruling to the appropriate court in the manner provided by the Michigan statutes, principally Section 26, supra. Graff ignored this reasonable administrative remedy, and attempted to obtain a declaration from the federal district court striking down the Michigan statute without first seeking the Commission's declaratory ruling. In addition to available state remedies to seek declaratory rulings, Graff also has been participating in the nearly completed MPSC proceeding relating to the issues in this case. Graff can then appeal any MPSC order by right to the Michigan Court of Appeals, pursuant to M.C.L. 462.26; M.S.A. 22.45 and obtain a court ruling on all state and federal constitutional issues presented, with the aid of the MPSC evidentiary record which has now been compiled.

312 U.S. 496 (1941), also justifies the decisions below.[12] Under the Pullman abstention doctrine, when a state law is challenged in federal court as unconstitutional and questions of state law exist which may dispose of the case, a federal court should abstain and allow the state courts or state administrative process to decide.

3. The Burford Doctrine.

The abstention doctrine established in Burford v. Sun Oil Co., 319 U.S. 496,

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[12]Pullman involved an order issued by the Texas Railroad Commission requiring a conductor to operate sleeping cars on railroad lines within the state of Texas. Plaintiffs alleged that the Texas order violated the Equal Protection Clause, Due Process Clause and Commerce Clause of the U.S. Constitution. In ordering the district court to abstain while the parties sought a state ruling on the state issues, the Court relied on notions of comity, discretion and restraint.

reh. den., 320 U.S. 214 (1943), also justifies the decisions below.[13] This Court and other federal courts have consistently applied the Burford doctrine.

B. M.C.L. 479.10a(6), in Conjunction with the Michigan Motor Carrier Act, Involves a Vital State Interest.

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[13]The Burford Court held that the federal district court should have dismissed the complaint in a case involving proration orders regarding Texas oil fields, on the ground that the issues involved a specialized aspect of a complicated regulatory system of local law, which should be left to the local administrative bodies and courts. In this case, there is a complex state regulatory scheme which would be disrupted if federal court review was permitted. Michigan has promulgated pervasive legislation regarding the conduct of motor carriers comprised of some 90 statutory provisions with diverse and widespread purposes. In addition, Michigan has promulgated extensive Motor Carrier Rules (Mich. Ad. Code R. 460.18101 et seq (1988), a Motor Carrier Safety Act (1963 P.A. 181, M.C.L. 480.11 et seq; M.S.A. 9.1666(1) et seq) and extensive Motor Carrier Safety Rules (Mich. Ad. Code R. 460.16101 et seq (1982)).

In this and other proceedings, Graff has argued that 10a(6) does not involve a vital state interest because only Michigan has such a requirement and neither the ICC nor any of the other 49 states have a similar requirement.[14] However, prior to having filed its Sixth Circuit brief opposing rehearing, Respondents obtained a copy of a United States Department of Transportation ("U.S.D.O.T.") report to Congress dated September 30, 1990 indicating that there was a similar employer/employee requirement in several states other than Michigan.[15] Subsequent research indicates

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[14]In its Petition, Graff has finally, yet reluctantly, conceded, that other states also have an employer/employee requirement similar to 10a(6).

[15]Pages 37-38 of this U.S.D.O.T. report to Congress indicated that New York, Texas, Pennsylvania, Virgina and West Virginia all had requirements that owner-operators be employees of a carrier.

that several additional states do, in fact, have a requirement similar to 10a(6).[16]

Similar employer/employee provisions in other states no doubt exist because there is a legitimate public policy basis for states to require that leased equipment only be operated by employees of the carrier or individuals over whom the carrier exercises substantial control. The purpose of 10a(6), and other similar leasing provisions is to ensure direct responsibility between the carrier (and drivers) to the affected public. The regulated carrier is more financially able to account to the public than the

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[16]These states include Georgia, Louisiana, Massachusetts, Rhode Island, South Carolina, South Dakota, and Washington.

individual independent contractor. With 10a(6) in place, a motor carrier of property for hire in Michigan using leased equipment has the same liability responsibilities as a like carrier using its own equipment with payrolled drivers. Thus, the legislative intent in enacting 10a(6) was to advance public safety.

By virtue of 10a(6), all for-hire carriers, operating in intrastate commerce, bear public liability without the necessity of judicial determination of driver status. As a requisite to receipt of a MPSC certificate of authority for carriers to transport property for-hire in leased equipment, motor carriers must utilize driver-employees. Under the common law, the driver status was determined <u>after the fact</u>. Section

10a(6) determines driver status before the fact and makes the driver a "statutory" employee. Thus, a negligent act of a driver in Michigan is the negligent act of the carrier. No longer may the carrier disavow the driver.

Graff's argument that the lack of any such requirement on an interstate level somehow preempts the ability of a state to impose such a requirement for intrastate transportation also ignores the effect and intent of the Interstate Commerce Act.[17] Moreover, Graff's argument is meritless because Michigan's regulation applies only to intrastate

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[17]The Interstate Commerce Act, 49 U.S.C. § 10521(b), specifically recognizes and reserves the exclusive right of the states to regulate the operations of motor carriers engaged in intrastate commerce.

transportation, not interstate, and does not burden interstate transportation in any manner.

Additionally, in determining the vital state interest associated with 10a(6), and other provisions of the Michigan Motor Carrier Act, the Act must be viewed as a whole and not analyzed piecemeal because 10a(6) is merely a sub-section of one section of the Act. Graff obtains significant benefits under Michigan's Motor Carrier Act for purposes of intrastate transportation, and should not be permitted to escape reasonable responsibilities also imposed by the same Act.

C. The Decision Not to Appeal the Legally Deficient State District Court Orders, Finding 10a(6) to be Unenforceable Against Graff and ABC Cartage, does not Evidence "Younger" Bad Faith by Respondents, Warranting Certiorari, Because the Panel Below Correctly Recognized that such Appeals Would not Promote a Resolution to this Controversy and Because the Panel's Affirmance of the District Court's Abstention Order was Based not on the State District Court Proceedings, but Instead on the MPSC Proceeding Which is Ongoing and Which will Lead to a Final Resolution.

In its Petition, Graff argues that Respondents have engaged in Younger bad faith by continuing to enforce 10a(6) against Graff after certain state district courts held that provision to be unconstitutional based on federal

grounds[18]. While Respondents did rely somewhat on the state district court proceeding involving Graff in support of their Motion for Abstention, clearly the primary basis for abstention was the pending MPSC complaint proceeding filed against Graff on May 22, 1989.[19] It is important to note in this regard that it is the MPSC which has the most extensive

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[18]Graff references three state district court proceedings, People v. Graff Trucking Indiana Div., 3rd District Court, Case No. 89-1137-1-ST, Order dated 6/25/90 (Pet App 18a-19a); People v. ABC Cartage, 52nd District Court, Case No. 89-002118, order dated 5/15/90 (Pet App 26a-27a), and People v. CTX Division of Central Transport, 34th District Court, Case No. 88-816850, order dated 3/22/89 (Pet App 23a-25a).

[19]Respondents argued that the federal court should abstain so that the MPSC would be able to hear this case, develop a full evidentiary record and issue an order from which Graff would have an automatic appeal of right in the Michigan Court of Appeals.

responsibility and experience in administering the Motor Carrier Act and the most sophisticated contested case procedures for properly noticing the issues to the whole motor carrier industry and for formulating a proper evidentiary record upon which the issues can be resolved either by the MPSC or the state appeals court.

Additionally, as clearly conceded by Graff in its petition, Respondents, commencing with the filing of the complaint against Graff, ceased enforcement of 10a(6) against existing operations of motor carriers. Thus, for carriers, like Graff, who currently are violating 10a(6), Respondents have chosen to not take any enforcement action until the conclusion of the MPSC proceeding involv-

ing Graff and possibly any court of appeals review thereof. Respondents have taken this approach to obtain a comprehensive resolution to the issues presented, despite the fact that it would not be an act of bad faith to continue enforcement of a statutory provision that has been in effect for over 30 years; that has not been declared unlawful or unconstitutional by the MPSC, a Michigan appellate court or any federal court; and where no injunction against enforcement has ever been granted.

What Graff is really complaining about is the fact that it cannot add to its operations by filing leases for additional equipment which do not comply with 10a(6). Clearly, Respondents have acted in good faith by ceasing enforcement

against existing operations until resolution of the issues in this case by the MPSC and state courts. Respondents by their current practice, have thus preserved the status quo on existing operations, but have not agreed to exacerbate 10a(6) situations by receiving additional leases for expanded operations which do not comply with 10a(6).

Graff also argues that it was bad faith for Respondents not to have appealed any of the three Michigan district court rulings relating to 10a(6), even though it was the local state prosecutor and not the Respondents who represented the State's interest in those cases. While the local prosecutor or perhaps the non-party Attorney General could have sought to appeal the State

district court decisions to the appropriate Michigan circuit court, both the district court and the circuit court orders would be limited in their force and effect to the Defendant carrier itself (i.e. Graff, ABC, CTX) and to the jurisdictional boundaries of these courts. While either party could thereafter have sought an appeal in the Michigan Court of Appeals, this would be an appeal "by leave" rather than "of right" and thus there would be no guarantee that the Michigan Court of Appeals would hear the case.[20]

On the other hand, following the MPSC order, the appeal "of right" lies directly in the Michigan Court of Appeals

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[20]MCR (Michigan Court Rule) 7.203(B)(2).

pursuant to M.C.L. 462.26; M.S.A. 22.45. Moreover, both the MPSC and court of appeals orders would have statewide force affecting not only Graff, but all other motor carriers operating in Michigan. In addition, the MPSC proceeding permits proper notice to all potentially affected motor carriers and the ability to formulate a complete evidentiary record applicable to the factual and legal issues presented. Therefore, it was not bad faith for Respondents not to have appealed these state district court

decisions.[21]

Moreover, the state district court rulings are deficient for purposes of ultimately resolving this controversy. For example, the Michigan district court decision involving Graff is based entirely on a Motion to Dismiss and supporting arguments submitted by Graff in that case. The prosecuting attorney representing the state's interest, was

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[21]Both Judge Gibson in his two district court orders, and the Sixth Circuit panel in their opinion and order were cognizant of the substantial advantages and fairness inherent in the MPSC proceeding and thus determined that there would be absolutely no prejudice whatsoever to Graff in having this matter litigated pursuant to MPSC and state court of appeals review. Nevertheless, both Judge Gibson and the panel did expressly indicate that Graff would have the right to return to federal district court if the MPSC, in conjunction with the Michigan Court of Appeals, did not adequately redress Graff's concerns.

totally unfamiliar with motor carrier law, filed no response on the merits (except for a pro-forma answer), and at the oral hearing that took place on June 20, 1990, did not respond nor object to Graff's Motion to Dismiss. No evidentiary hearing was held and no written opinion was ever issued by the state district court. The court's order (Pet App 18a-19a) was prepared by counsel for Graff and merely signed by the Judge after the fact. In other words, this district court proceeding is not a case where a competent court, following development of a full evidentiary record and submission of briefs from both parties, issued an informed and reasoned opinion and order. It would, therefore, not have contributed to resolution of this issue for the Attorney General to

attempt to step in on behalf of the state prosecutor and appeal any of these district court orders. It is much more logical, instead, to go forward with the MPSC proceeding which is based on a thorough and extensive evidentiary record.

Furthermore, neither the circuit court nor the court of appeals (even if leave was granted) would be capable of issuing a well-reasoned or informed decision based on any appeal of the Michigan district court proceedings referenced by

Graff.[22] Finally, Respondents seek to avoid a situation where one district court judge dismisses citations based upon instantaneous summary rulings of other district court judges, as occurred in the district court proceeding involv-

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[22]Even if the Michigan district court proceeding involving Graff had involved a response on the merits by the prosecutor and an informed and well-reasoned opinion of the judge, that would merely be one district court judge's opinion out of 249 sitting district court judges in 125 separate district courts/divisions located throughout Michigan, all of whom may interpret this statute differently. It is merely to avoid this potentially overwhelming multiplicity of suits that the Respondents have chosen to proceed in the complaint proceeding pending at the MPSC after which Graff would have an appeal of right in the Michigan Court of Appeals. Moreover, the MPSC having primary jurisdiction responsibility, and expertise relative to the Motor Carrier Act should be the body to initially hear and decide relevant legal or factual issues presented.

ing Graff.[23]

Petitioner also argues that the MPSC Staff's motivation in filing the formal complaint against Graff at the MPSC was "to avoid a federal court determination of Graff's Commerce Clause and Supremacy Clause issues," and thus was "bad faith." Although Mr. Thomas Lonergan, head of the MPSC Motor Carrier Staff, testified that he felt the MPSC would be a "better forum in which to present the factual issues" involved in the Graff case, he also testified that the hundreds of alleged violations by Graff would normally warrant the filing of a formal complaint by Staff

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[23]During his oral argument to Judge McManus in the Michigan district court proceeding, counsel for Graff cited the district court's decision in People v ABC Cartage, which Judge McManus relied on in dismissing the citations.

in any event, especially where two years of correspondence and warnings had failed to bring Graff into compliance.

The Court must also understand the reason why MPSC review of this matter is so critical. 10a(6) requires that when a motor carrier is utilizing leased equipment in Michigan intrastate commerce, that equipment be operated by an employee. Up until 1977, the MPSC had never examined 10a(6) in order to determine exactly what was necessary for compliance with this employer/employee requirement. In that year, however, the Commission issued an order In Re: American Motor Lines, File No. L-8484 (Order dated 7/11/77) adopting the position that compliance with this employer/employee provision required that carriers

withhold taxes and make proper deductions from an owner-operator's wages when operating in intrastate commerce.

It is this particular MPSC interpretation of the employer/employee requirement, rather than the statute itself, that Graff, ABC Cartage, CTX and Universal Am-Can have objected to in various state and federal court proceedings beginning in 1988. The reason for this is that these carriers wish to treat their owner-operators as independent contractors rather than employees so as to avoid the additional payroll expenses of withholding taxes, etc., some of which involve costly administrative expenses and matching contributions by the carrier. Had the Commission, in the American Motor Lines case, interpreted

the employer/employee requirement to require something other than withholding of taxes, etc., these carriers would not now, nor ever have objected to this provision, on constitutional or any other grounds.

In its brief submitted to the ALJ and the MPSC in the MPSC complaint proceeding against Graff, the MPSC Staff has proposed that the Commission reexamine its order in American Motor Lines. The MPSC Staff has proposed that the Commission could, if it so chose, rely on other criteria for determining compliance with the employer/employee requirement that did not involve withholding of taxes, etc.[24]

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[24]In his Proposal for Decision dated March 6, 1991, the ALJ did not recommend adopting a new test, however, the MPSC and/or the Court of Appeals, on review, may find a new test to be appropriate.

Should the Commission decide that withholding of taxes etc. would no longer be required as necessary for compliance with 10a(6), then the entire issue would likely be resolved and mooted. And this would be done without the need for any Court of Appeals review of the MPSC order.[25]

D. The MPSC in Conjunction with the State Courts can Decide the Constitutional Questions in this Case.

Graff continues its relentless attack of the MPSC proceeding based on the

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[25]Of course, the Commission could also decide to merely reaffirm its Order in American Motor Lines and continue to require the withholding of taxes, etc. for compliance with 10a(6), as was recommended by the ALJ, in which case Graff would still have its appeal of right in the Michigan Court of Appeals, wherein it could present its constitutional and other attacks on continued enforcement of this provision.

MPSC's recognized inability to declare its enabling statute unconstitutional.[26] In response, Respondents submit that the MPSC, regardless of whether it has the power to declare 10a(6) unconstitutional, clearly does have the power to declare it valid and enforceable. The MPSC also has the most accessible and sophisticated procedures to ensure proper notice, and use of other contested case procedures, to develop a proper evidentiary record upon which both constitutional and other attendant legal or factual issues can be resolved. Graff is also guaranteed the right to present its legal issues, including those involving the constitutionality of 10a(6), upon appeal of the

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[26]Graff cites In Re: Central Transport, Inc., MPSC File No. C-6714, #60 (Order dated 1/9/90).

MPSC order to the Michigan Court of Appeals.

As noted previously, the proceeding pending against Graff at the MPSC is the first MPSC proceding which involves a review on the merits of all the facts and arguments concerning the validity of 10a(6). On May 28, 1991, this case will be submitted to the MPSC for ultimate decision. Even if the Commission does not rule upon Graff's constitutional claims, Graff would not be prejudiced in light of its statutory right to seek judicial review of the Commission's order. This Court has previously held that the fact that a state agency would not consider constitutional claims did not preclude Younger abstention where the constitutional claims could be presented

on review in state court.[27]

E. M.C.L. 479.10a(6) does not Impose an Unconstitutional Burden on Interstate Commerce.

Graff argues that 10a(6) violates the Commerce Clause by analogizing 10a(6) with other state statutes which this Court struck down as being a burden on interstate commerce.[28] However, a critical difference exists between those cases and the instant proceeding. In those cases, a state imposed restrictions on a motor carrier operating in interstate

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[27]Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

[28]Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways, 450 U.S. 662 (1981).

commerce as that motor carrier passed through the state. In order to avoid a potential of 50 non-uniform requirements for carriers engaged in interstate commerce, this Court struck down those state laws. However, 10a(6) does not apply to interstate transportation, but only to intrastate transportation. Thus, if a carrier transports a shipment from Wisconsin to Ohio through Michigan, then no requirement exists that the carrier comply with 10a(6). Graff's arguments on the issue are thus wholly inapplicable to this case.

RELIEF REQUESTED

Respondents respectfully request that this Honorable Court deny Graff's Petition for Writ of Certiorari.

Respectfully submitted,

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March 22, 1991

(3)

No. 90-1328

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

GRAFF TRUCKING COMPANY, INC.,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission;
STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission;
and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S RESPONSE TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Only Through Issuance of the Writ can this Court Prevent the Cynical use of *Younger* by the States as a Tactical Device to Delay Consideration of Federal Constitutional Issues.

It is now over three years since a carrier first attempted to obtain Michigan state court resolution of the federal constitutional claims which Petitioner Graff presented to the U.S. District Court below. Despite (a) three state district court dismissals of criminal actions brought against carriers for violations of the statutory provision in question, MCL 479.10a(6), none of which were appealed by the State (Pet. App. G, H, J, and K); (b) two state court civil actions filed by carriers seeking a declaratory ruling that the statute was unconstitutional based on, in the main, Federal Commerce Clause and Supremacy Clause grounds (Pet. App. M, P and Q), and (c) the presentation by still another carrier of the issue of constitutionality to the Michigan Public Service Commission (MPSC) charged with responsibility for administering the statutory provision (Pet. App. O), the question is no closer to resolution by the state than was the case three years ago. The MPSC proceeding presently pending against Graff referred to by Respondents in their Brief in Opposition will not yield a decision on the merits of the issue, as the MPSC is devoid of jurisdiction to determine the constitutionality of its own enabling statute[1]. The net result of this

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[1] Respondents charge that the authority for Graff's position on this point is *Central Transport, Inc.*, MPSC File No. C-6714, Case No. 60 (January 9, 1990) (Pet. App. O). It is true that the *Central* decision involved a claim by that carrier, resting on the exact same grounds as Graff has raised in this proceeding, that the statute was unconstitutional. The Commission ruled that it had no authority to determine such a question, and pointed out that it had so ruled previously, in *Allied Delivery System, Inc.*, File No. L-11332 (January 3, 1979). See also, *In the Matter of the Complaint and Petition for an Investigation and Revocation of the Certificate of Robert LaLone & Sons, Inc.*, File No. L-14979 (May 17, 1976), in which the Commission ruled that its role ended, once it had found a carrier to be in violation of the statute, and that it did not possess the power to determine that a statute was unconstitutional. As was there stated, at p.2, "to do so would be, in effect, to extend

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litigation, after three years, is one clear decision by a state district court that the statute is unconstitutional, based on the Federal Commerce Clause, involving Graff itself. No state court has issued a decision, however, despite this litigation, which the MPSC feels bound to recognize as legitimate. Indeed, Respondents feel free to denigrate the legitimacy of state district court proceedings in their pleadings filed with this Court.

Respondents have perfected the abstention defense into a high art form. One or another of the civil actions brought in the state circuit court, or an appeal by the State of one of the criminal dismissals, could have been well along in the appellate process by this time, if Respondents had not been so intent on avoidance of a decision by a competent tribunal.

In point of fact, district courts play an important role in Michigan's unitary court system, which includes a district court, a circuit court, a court of appeals, and a supreme court, as well as a

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the scope of the authority provided by the Commission statutory base. See *Dation v. Ford Motor Co.*, 314 Mich. 152, 159 (1946) and *Trenton Chemical v. U.S.*, 201 F.2d 776, 778 (1953)." It is not just the MPSC, then, which is the source for the proposition that a Michigan administrative agency does not possess the power to determine the constitutionality of its own enabling statute. *Dation* supports this proposition, as well as numerous other Michigan appellate decisions, including *Michigan Mutual Liability Co. v. Baker*, 295 Mich. 237, 242; 294 N.W.2d 168 (1940); *Golembioski v. Madison Heights Civil Service Commission*, 93 Mich. App. 137, 153; 286 N.W.2d 69 (1979); *Dickerson v. Marquette Warden*, 99 Mich. App. 630, 641-642; 298 N.W.2d 841 (1980); *Wronski v. Sun Oil Company*, 108 Mich. App. 178, 187; 310 N.W.2d 321 (1981); and *Adkins v. Civil Service Department*, 140 Mich. App. 202, 213; 362 N.W.2d 919 (1985). All of these cases stand for the proposition that administrative agencies in Michigan have no power to rule on the constitutionality of their own enabling statutes. See, also, in this regard 73 C.J.S., Public Administrative Law and Procedure, § 65, p.36, in support of the same proposition. The law in Michigan is clear, as Respondents conceded during oral argument before the Court of Appeals below, that the Michigan Public Service Commission cannot determine the federal constitutional question involved in this case.

probate court[2]. District courts possess jurisdiction over misdemeanor proceedings, civil infraction actions, and civil actions where the amount in controversy does not exceed $10,000, as well as certain equitable and other actions[3]. Appeals of district court decisions are provided, as a matter of right, to the circuit court[4]. Subsequent appeals from the circuit court are allowed by leave to the court of appeals, and even, ultimately, to the supreme court[5]. It is also firmly established, in Michigan law, that district courts do in fact have the power to declare statutes unconstitutional[6]. The state district court, when it issued its decision in *People v. Graff Trucking, Indiana Division*, 3-2 Judicial District Court, No. 89-1137-1-ST, was clearly acting within its jurisdiction. Either the prosecutor or the attorney general could have appealed that decision, had they chosen to do so. They did not. They did not, because Respondents have taken the position that they are not bound by that decision in any event. This is despite the fact that Respondents informed the U.S. District Court below that Petitioner Graff could raise its constitutional argument in the state district court criminal proceeding, so that there was no need for the federal court to exercise its jurisdiction. Certainly, that argument was presented in bad faith.

If Respondents felt that the state district court decision in *Graff* was flawed in any respect, they could have appealed that decision to the circuit court and later to the Michigan Court of Appeals and Michigan Supreme Court, as other aggrieved parties would be required to do. Instead Respondents felt free, as representatives of the State of Michigan, to merely dismiss the opinion, as incompetent and inapplicable to them. Private litigants certainly do not possess the same freedom to express disdain and contempt for

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[2] Mich. Const. 1963, Art. VI, § 1, and MCL 600.8101(1).

[3] MCL 600.8301 – 600.8311.

[4] MCL 600.8342.

[5] MCL 600.8342(4) provides for appeal by leave to the court of appeals. MCL 600.215, as well as the Michigan Court Rules, MCR 7.302 provide for appeal to the Michigan Supreme Court by leave only, regardless of the court in which the case initiated.

[6] *Marshall v. Pech*, 95 Mich. App. 454, 460, fn 3; 291 N.W.2d 78 (1981).

state court pronouncements of whatever level. This course of conduct is reflective of Respondents' bad faith[7]. Respondents failed to appeal not only the dismissal of the misdemeanor citations against Graff, but also against two other carriers for alleged violations of the same statute.

If Respondents did in fact hold the state district courts in such low esteem, Respondents should not have pointed the attention of the U.S. District Court to that forum, as a place where Graff could have its constitutional claim heard. Graff, once again, is aware of no decision by this Court which approved the use of *Younger* abstention, where the very same state invoking *Younger* had failed to appeal a state court dismissal of criminal charges against a party, when that dismissal was based on federal constitutional grounds. To allow *Younger* to be utilized by states, in such situations, effectively deprives litigants, such as Graff, of any forum in which to raise the federal constitutional challenge.

Of course, Respondents argue that Graff can, ultimately, raise its federal constitutional challenge in an appeal from the state administrative body, when that body ultimately issues its decision. Respondents point out that the record has already been completed in the state administrative proceeding against Graff, and Respondents refer to the Proposal for Decision of the Administrative Law Judge, which decision recommends Draconian penalties against Graff[8]. The state administrative proceedings should actually have been a simple one, given Graff's admission that it was treating

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[7] It was the state district court judge who directed Petitioner's counsel to prepare the order of dismissal in Graff and present it to the prosecutor for approval (Pet. App. G, p.17a). Such a procedure is established by the Michigan Court Rules, and is a normal practice. See MCR 2.602(B).

[8] The Proposal for Decision recommended a one year suspension of all of Graff's Michigan intrastate operations, a civil assessment of $5,500, and various other relief. The Proposal for Decision virtually mirrored the arguments advanced by Staff in justification for this Michigan Statutory provision, and made findings of fact relating to numerous areas where that same administrative law judge concluded that the Commission had no jurisdiction – constitutionality.

these owner-operators as independent contractors, in violation of the state statutory provision. However, Staff of the MPSC, in its evidentiary presentation, sought successfully to have established findings on legislative history and purpose, issues important ultimately to a Commerce Clause or Supremacy Clause determination. Respondents' strategy is clear – to have findings determined by the agency which is strongly committed to defense of this statute. When Graff appeals this matter then to the Michigan Court of Appeals, it will be left with an appellant's burden from an administrative agency decision as to legislative purpose, as opposed to a determination by an impartial trial court. Respondents, while being protected by *Younger*, in this case, have engaged in forum shopping of the worst kind. They have avoided a determination on the merits by any competent and independent trial court in this state, until Respondents could first have established findings of fact most favorable to a determination that the law is in fact constitutional, by the very same administrative agency, the staff of which has aggressively enforced the law and defended its validity over the past three years.

There is further no merit whatsoever in Applicant's suggestion that the MPSC, in some respect, has a more sophisticated process to "develop a proper evidentiary record" than does a state trial court, be it a circuit court or district court. Those, indeed, are the forums which have the jurisdiction to determine the law unconstitutional[9].

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[9] The two proceedings brought by carriers for declaratory judgments in state circuit court were brought in Wayne County, the most populous county in the state, and Macomb County, which lies in the Detroit metropolitan area. Both counties have numerous circuit judges (36 in Wayne and 8 in Macomb), and cases are assigned by blind draw. The Wayne County case, (Pet. App. 1, A2) was directly tied to a misdemeanor proceeding (Pet. App. 1, A1) in that same county, where the state district court judge had signed an order holding those misdemeanor citations in abeyance while the declaratory judgment action was filed in Wayne County Circuit Court. The Macomb County Circuit Court action (Pet. App. 1, D1) was filed in the county where the plaintiff carrier maintains its principal place of business. In no way can it be argued by Respondents that the plaintiff carriers in either of those actions would have received an unfair advantage.

Neither is Respondents' bad faith mitigated by its referred to policy on non-enforcement. This non-enforcement policy appeared, for the first time, in a response to Graff's Petition for Rehearing before the United States Court of Appeals for the Sixth Circuit below, after Respondents had been directed by that Court to file a response to Graff's Petition for Rehearing. Apparently concerned that their tactics had caught up with them, Respondents announced, in a footnote in that pleading, this non-enforcement policy. That non-enforcement policy was worded ambiguously, Graff submits, so that Respondents can say that it means anything that Respondents wish it to. It is not a formal policy by Respondents, but a representation made by their counsel, and Respondents would feel just as free to disregard it, undoubtedly, as they are free to disregard state district court opinions holding this statute unconstitutional. Graff does dispute whether this moratorium has any purpose or effect, contrary to Respondents' contention. Further, the moratorium has been interpreted in a manner so narrow as to make it virtually meaningless[10].

Neither does the argument presented by Respondents that Staff has urged the Commission to interpret the statutory provision in such a way as to render it benign weigh against the federal court intervention. The Michigan statute plainly requires the individuals to be employees. This is contrasted with the federal scheme, which recognizes that such owner-operators have traditionally been treated as independent contractors, since 1935. No amount of interpretation by the state administrative agency changes the basic construct of this law. it is at odds with the federal scheme. That is what makes the law repugnant to the United States Constitution.

Bad faith is present, on a grand scale. The *Younger* doctrine, by its very terms, does not apply to situations where a state has exhibited bad faith of this nature. The writ should be granted in this case, to remind states that this policy should not be abused.

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[10] As owner-operators terminate their relationship with Graff, for example, and it becomes necessary for Graff to add new owner-operators, those new owner-operators are held not to be covered by the moratorium on enforcement. Thus, through the normal process of attrition, Graff has

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2. The Writ Should be Granted to Establish Beyond Doubt that Passage by a State Legislature of a Law does not make that Law a Vital State Interest.

Respondents argue, at footnote 10 on p. 12 of their Brief in Opposition, that a valid state purpose is established if the legislature enacts a provision. Life is not so simple, unfortunately. This Court has made plain, in cases such as *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429; 98 S.Ct. 787; 54 L.Ed.2d 664 (1978), that the mere incantation of a purpose by a state is not sufficient to establish that purpose. However, the district court below based its finding that *Younger* abstention was required, not on facts, but on arguments presented by Respondents' counsel. The same sophistry presented by Respondents to the U.S. District Court below is offered here. Those arguments are without merit.

The arguments ignore the fact that the Interstate Commerce Commission in some 45 years of strict motor carrier regulation prior to passage of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, never found it necessary to impose an employer-employee requirement. The State of Michigan regulated motor carriers economically for over two decades, before this statutory provision was tacked onto an economic regulatory law in order to protect the organizing interests of a labor union. That two other states, as Petitioner contends, or 12 other states, as Respondents contend, have a similar statutory provision does not establish, further, that the law has as its purpose protecting public safety[11].

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fewer and fewer drivers covered by the moratorium. Moreover, any new or existing carriers found to be violating this law are not covered by the moratorium in Staff's interpretation, if the MPSC was unaware of such operations previously. Thus, Staff takes enforcement action in any manner in which it chooses. This moratorium was created for the sole purpose of avoiding reversal of the U.S. District Court's decision below.

[11] Respondents equate an "exclusive direction and control" requirement by other states with the Michigan provision. Exclusive control does not necessarily imply employee status, as the ICC and federal courts have long recognized, however.

The fact is that motor carriers (at the federal level, and in Michigan) are responsible for the operation of equipment leased to it, whether those individuals driving that equipment are independent contractors or employees of the carrier[12].

It is determined *before the fact* that motor carriers are responsible for vehicles operating under lease to it by the ICC. The mere operation of that equipment makes the motor carriers responsible for the operation thereof. Moreover, motor carriers are required to maintain insurance in prescribed amounts, regardless of the status of their drivers. It was error for the lower court to base its conclusion as to purpose on the arguments of Respondents' counsel. There is no vital state interest involved in this proceeding, other than to assist a labor union in its organizing efforts.

3. Neither was Abstention Appropriate Under Either the *Pullman* or *Burford* Doctrines.

Respondents also present arguments concerning *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 496, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) in their response. The U.S. District Court did not rest its decision on either *Pullman* or *Burford* in any way. These arguments are variations on a theme by Respondents, and part of their well formulated strategy to avoid federal court jurisdiction.

Neither *Pullman* nor *Burford* should be held to apply in this case. There is no "sensitive area" involved in the instant proceeding, as Justice Frankfurter referred to in *Pullman*[13]. Neither is there

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[12] This is one of the reasons why the ICC has never found it necessary to impose an employer-employee relationship requirement. Historically, owner-operators have been treated as independent contractors and motor carriers have been permitted to treat those owner-operators as independent contractors by not only the ICC, but also the Internal Revenue Service and the National Labor Relations Board, as long as the requisite tests are met.

[13] 312 U.S. 498.

any complex state regulatory scheme involved in this case, as was the case in *Burford,* despite Respondents' arguments to the contrary. This statute has nothing to do with the economic regulation of motor carriers in Michigan. The facts with regard to Graff's treatment of the owner-operators is not in dispute. Graff treats those owner-operators as independent contractors. The Michigan statute requires them to be treated as employees. Those are the complex facts involved in the state administrative proceeding, which is nearly two years old. Neither *Burford* nor *Pullman* have relevance.

4. The Michigan Statute does Impose a Burden on Interstate Commerce.

Respondents deny that MCL 479.10a(6) imposes an unconstitutional burden on interstate commerce, arguing that it only imposes restrictions on intrastate operations. The net effect of the law, however, is to require Michigan carriers operating in Michigan intrastate commerce to treat their owner-operators as employees, even when operating in interstate commerce, as Graff's owner-operators do the vast majority of the time. One cannot be an employee of Graff for four hours a week and an independent contractor of Graff for 36 hours a week. Making an owner-operator an employee for only a short period of time each week effectively taints the independent contractor relationship, which is why this provision has been so near and dear to the hearts of organized labor.[14] The only other alternative is for motor carriers to assign certain individuals to interstate duty only and other individuals to intrastate duty only. This results in duplicative costs, worsened service, increased deadhead (empty) miles, and inefficient operations. Moreover, carriers are deterred from operating in Michigan intrastate commerce which would otherwise choose to do so. The Michigan law has a direct

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[14] It is even Respondents' position that a trailer carrying both interstate and intrastate shipments is deemed to be intrastate commerce, making compliance with the employee provision necessary.

impact on not only a carrier's Michigan operations, but its operations overall. That is why this provision has been the subject of the extensive, albeit fruitless, litigation outlined by Graff in its Appendices to its Petition.

CONCLUSION

Without federal court jurisdiction in a matter such as this, a state can drag its feet for years, through clever and indeed sophisticated legal strategy. *Younger* becomes an obstacle to any determination on the merits of a federal constitutional claim, then. That is what has happened here. No decision on the merits will be made by the MPSC in the State administrative proceeding involving Graff, although findings of fact potentially fatal to Graff's appeal may very well be incorporated in such a decision. Any decision by the Michigan Court of Appeals on such an appeal is some years down the road, given the current state of that court's docket. All the while, the statute is enforced. *Younger* should not be held to apply in such a situation.

For the reasons expressed, it is respectfully prayed that a Writ of Certiorari issue to review the decision of the United States Court of appeals for the Sixth Circuit.

Respectfully submitted,

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